No. 77-52

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD T. FORD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

CITATIONS

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 550 F.2d 732.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 3, 1977. A peti-

tion for rehearing with a suggestion for rehearing *en banc* was denied on May 9, 1977 (Apps. C and D, *infra*). On June 6, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production for trial on federal criminal charges of a state prisoner against whom a federal detainer has previously been lodged, constitutes a "written request for temporary custody" making applicable the terms and conditions of Article IV of the Interstate Agreement on Detainers Act.

2. Whether respondent, by failing to raise the issue in the district court, waived the claim that his indictment should have been dismissed for violation of the Interstate Agreement on Detainers Act.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1402, 18 U.S.C. App., pp. 4475-4477, provides in pertinent part:

Article II

As used in this agreement:

(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia * * * .

* * * * *

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint * * * .

* * * * *

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, in-

formation, or complaint on which the detainer is based.

* * * * *

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * * *

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

* * * * *

Article V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had * * * .

* * * * *

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

2. 28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(5) It is necessary to bring him into court to testify or for trial.

STATEMENT

1. In November 1971 the United States District Court for the Southern District of New York issued a warrant authorizing respondent's arrest for bank robbery. On October 11, 1973, federal agents executing this (and one other) warrant arrested respondent in Chicago. Shortly after his arrest, respondent was turned over to Illinois authorities for extradition to Massachusetts on older, unrelated state charges. Upon respondent's transfer to Massachusetts, the federal bank robbery warrant was lodged as a detainer with Massachusetts prison authorities.

An indictment (74 Cr. 279) filed in the United States District Court for the Southern District of New York on March 21, 1974, charged respondent with bank robbery and aggravated bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Pursuant to a writ of *habeas corpus ad prosequendum* issued by the district court, respondent was produced from Massachusetts for arraignment before the federal court in New York on April 1, 1974; he entered a plea of not guilty to the indictment (R. App. H; Tr. of April 1, 1974, pp. 4-5). Two days later, a superseding indictment (74 Cr. 336) was filed charging respondent and another person, James R. Flynn,

[1] Respondent pleaded guilty to the Massachusetts charges on February 8, 1974, and was sentenced to concurrent terms of 8 to 10 years imprisonment (App. A, *infra*, pp. 2a-3a; R. App. F, ¶ 4). ("R. App." and "G. App." refer, respectively, to respondent's appendix and the government's appendix in the court of appeals).

with the same bank robbery charged in the superseded indictment, and also with use of a firearm in the commission of a bank robbery (18 U.S.C. 924 (c)(1)), interstate transportation of a stolen automobile (18 U.S.C. 2312), and conspiracy (18 U.S.C. 371) (R. App. B). On April 15, 1974, respondent pleaded not guilty to the charges in the new indictment, but co-defendant Flynn failed to appear (Tr. of April 15, 1974, 9:50 a.m., pp. 3-4).[2] Trial was thereafter set for May 28, 1974.

On May 17, 1974, the government moved, on the basis of a showing contained in a sealed affidavit, to adjourn the trial for a period of 90 days or until Flynn was apprehended, whichever occurred first. The motion was granted by the district court, and respondent's trial was rescheduled for August 21, 1974 (R. App. F; Tr. of May 22, 1974, pp. 2-8).[3] On June 14, 1974, respondent sought and was granted permission to be returned to Massachusetts, where his attorney's office was located, in order to facilitate preparation for trial (G. App. 2a; R. App. H; App. A, *infra*, p. 3). In August 1974 the case was reassigned to a different district judge (following the original judge's resignation from the bench) and

[2] Flynn was apprehended on February 14, 1977, and has since been brought to trial and convicted.

[3] In granting the adjournment, the court found no prejudice to respondent in the preparation of his defense and held that the government was entitled to a reasonable interval to attempt to apprehend Flynn so that judicial resources could be conserved by having respondent and his co-defendant tried jointly (Tr. of May 22, 1974, pp. 4, 6-8).

trial was reset for November 18, 1974 (R. App. D, ¶ 12). On November 1, 1974, however, the government requested an additional adjournment of up to 90 days in which to apprehend Flynn, and it filed a second sealed affidavit in support of this motion (R. App. G). On November 4, respondent moved to dismiss the indictment on the ground that he had been denied a speedy trial (R. App. D). The court denied the speedy trial motion, granted the government's application for adjournment, and set a new trial date of February 18, 1975 (App. A, *infra*, p. 4a).

On February 18, the district judge was engaged in a lengthy stock fraud trial, and a new trial date of June 11, 1975, was set. Respondent, although renewing his speedy trial claim, did not request reassignment of the case to another district judge (Tr. of February 18, 1975, pp. 1-4). In the following month, the district court announced a crash program for the disposition of civil cases, to commence June 1. Because of this program, respondent's trial was postponed a final time, until September 2, 1975.

The government secured respondent's presence for trial from Massachusetts prison authorities by means of a writ of *habeas corpus ad prosequendum* issued by the district court on August 8, 1975 (R. App. I). At the beginning of trial, respondent moved again to dismiss the indictment on speedy trial grounds; the motion was denied (R. App. E; Tr. 2-3, 186). Respondent was thereafter convicted by a jury on

all counts.[4] He was sentenced to concurrent terms of five years' imprisonment on each count (App. A, *infra*, pp. 4a-5a).

2. On appeal to the Second Circuit, respondent argued for the first time that his indictment should have been dismissed with prejudice because he had not been tried within 120 days after his initial arrival in the Southern District of New York, in alleged violation of Article IV(c) of the Interstate Agreement on Detainers Act ("Agreement"), and because he had been returned to state custody (following his arraignment) without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Agreement.[5] Article IV of the Agreement provides that the prosecuting authority of a member state which has criminal charges pending against a defendant serving a prison sentence in another member jurisdiction may lodge a detainer with the prison authority of that jurisdiction and, upon written request, obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (except where a continuance is granted "for good cause shown in open co[illegible] in the presence of

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[4] During the six-day trial, 36 witnesses testified for the government and the stipulated testimony of 12 other witnesses was read to the jury.

[5] The United States joined the Agreement by Act of December 9, 1970, Sections 1-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 4475-4478. At all times relevant hereto, Massachusetts was also a party to the Agreement. Mass. Gen. Laws Ch. 276, App. Sections 1-1 to 1-8.

the prisoner or his counsel) and (b) prior to being returned to the sending state, or else the charges against him shall be dismissed with prejudice. Article IV(c), IV(e), and V(c).[6]

A divided panel of the court of appeals reversed the conviction and remanded the case to the district court with directions to dismiss the indictment with prejudice (App. A, *infra*, pp. 1a-29a). The court held that, whether or not a writ of *habeas corpus ad prosequendum* used to secure custody of a state prisoner serves as a "detainer" (see *United States* v. *Mauro*, 544 F.2d 588 (C.A. 2), petition for a writ of certiorari pending, No. 76-1596), "once a federal detainer has been lodged against a state prisoner, the habeas writ constitutes a 'written request for temporary custody' within the meaning of Article IV of the Detainers Act" (App. A, *infra*, p. 21a). The court rejected the government's opposing argument

[6] Article III of the Agreement provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III, prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction, and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III (a), III(d), and V(c).

that the Agreement, while allowing prisoners to clear detainers and to compel prompt disposition of pending charges against them (Article III), was not intended to affect the federal government's concurrent right to obtain custody of a prisoner for trial under the power of the writ *ad prosequendum*.[7] The court reasoned that failure to treat a writ as a "request" under the Agreement, if the writ was served after the lodging of a detainer, "would vitiate [the] operation [of the Agreement] insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ" (App. A, *infra*, p. 20a); moreover, it would "impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (*ibid.*).[8]

[7] The court also rejected, without discussion, the government's alternative argument that respondent had waived any claim under the Agreement by failing to raise such claim prior to trial (Gov't. Br., pp. 16-18).

[8] After thus concluding that the Agreement was applicable, the court held that the provisions of Article IV(c) had been violated. The majority ruled that the adjournments up to February 18, 1975, were properly granted, but that the subsequent adjournments neither were "for good cause" nor granted with "the prisoner or his counsel being present." App. A, *infra*, pp. 23a-25a. Based upon this violation of the Agreement, the court held that Article V(c) mandated dismissal of the indictment (*id.* at 25a).

In dissent, Judge Moore expressed his unwillingness "to thwart the jury's determination of guilt" on the basis of calendar technicalities, "particularly where no showing of prejudice therefrom has been made" (App. A, *infra*, pp. 28a-29a).

REASONS FOR GRANTING THE WRIT

Article IV(a) of the Interstate Agreement on Detainers provides that the appropriate officer of a jurisdiction in which an untried indictment is pending may have a prisoner who is serving a prison sentence in another jurisdiction and "against whom he has lodged a detainer" made available for prosecution "upon presentation of a written request for temporary custody or availability" to the proper authorities of the incarcerating State. Our petition in *United States* v. *Mauro*, No. 76-1596, presents the issue whether a writ of *habeas corpus ad prosequendum*, directing the production of a state prisoner for federal trial, itself constitutes the "detainer" that is a prerequisite to activation of the terms and conditions of the Agreement.

In the instant case a federal detainer was in fact lodged against respondent, after which his transfer was achieved by means of the writ. The present petition, therefore, presents the important and related question whether a writ of *habeas corpus ad prosequendum* issued after a detainer against a state prisoner has been lodged must be regarded as a "request" making applicable the provisions of Article IV of the Agreement. The court of appeals concluded that, regardless of the correctness of its decision in *Mauro*[9] (see App. A, *infra*, p. 16a), a writ issued by a federal district judge after a detainer has been

[9] The author of the majority opinion below dissented in *Mauro*.

lodged against a state prisoner must be considered a written "request" under the Agreement.

This decision, no less than the court of appeals' prior holding in *Mauro*, has left federal prosecutors profoundly uncertain about whether, and under what conditions, they may continue to use the historic writ of *habeas corpus ad prosequendum* to obtain custody of state prisoners for trial. Although prosecutors often employ the writ to secure the presence of prisoners against whom no detainer has been lodged, as was the case in *Mauro*, in a large number of cases custody of the prisoner is obtained after a detainer has been filed with the state authorities.[10]

Moreover, the problem raised by possible application of the Agreement to cases in which federal charges are prosecuted against state prisoners is one of substantial dimensions. While no statistics are kept regarding the number of *ad prosequendum* writs issued to secure the presence of state prisoners, the United States Attorney for the Southern District of New York, where this case arose, estimates that approximately 100-150 such writs are issued annually to state prison authorities in relation to trials in that district alone, a figure equalling approximately five percent of all defendants against whom criminal charges are preferred. If the experience of that

[10] Although this case and *Mauro* involve related issues under the Agreement, resolution of either case alone would likely not be dispositive of the other. In view of this fact, and the fact that numerous writs are issued both with and without the lodging of detainers, we do not recommend that the Court grant one petition while holding the other petition pending its disposition.

district, which accounts for about four percent of the nationwide total of federal criminal prosecutions,[11] is typical, there may be 2,500-3,000 defendants each year whose cases could be affected by the disposition of the issues raised in *Mauro* and in the instant case.

Federal prosecutors thus need to know with certainty what effect, if any, the lodging of a detainer will have upon the procedures that they follow to obtain state prisoners against whom federal charges are pending. The issue is further complicated by the fact that the Speedy Trial Act of 1974[12] establishes procedures governing the transfer and prosecution of state prisoners that in some respects differ widely from those set forth in the Agreement. As a consequence of the decisions in this case and *Mauro*, federal prosecutors in the Second Circuit apparently must observe one set of standards for obtaining and trying state prisoners and a second set of standards for obtaining and trying federal prisoners. Granting the petitions in *Mauro* and this case will permit this Court to define the government's obligation with respect to the transfer of state prisoners by clarifying the relationship between the Agreement, the Speedy Trial Act, and the writ of *habeas corpus ad prosequendum*.

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[11] In fiscal 1976, federal criminal charges were filed against 58,794 individuals nationwide, including 2,370 individuals in the Southern District of New York. See *1976 Annual Report of the Attorney General of the United States* 24.

[12] 88 Stat. 2076-2085, 18 U.S.C. (Supp. V) 3161 *et seq.*

1. Contrary to the decision below, we submit that neither the purpose nor the terms of the Agreement compels the conclusion that in enacting it as federal law, Congress intended to impose new and more rigorous conditions on federal prosecutors who obtain state prisoners by use of the writ of *habeas corpus ad prosequendum*. The United States, which has historically obtained state prisoners by use of the writ, did not become a party to the Agreement until 1970, shortly after this Court ruled that States had to expand their efforts to obtain federal prisoners facing state charges in order to assure them speedy trials. *Smith* v. *Hooey*, 393 U.S. 374; *Dickey* v. *Florida*, 398 U.S. 30. At that time, therefore, it was especially important that the States be given a practical and efficient method of obtaining federal prisoners for trial on state charges. Article IV of the Agreement thus allows member States to obtain federal prisoners in the simplified manner used to obtain prisoners from other member States; on the other hand, it provided no comparable benefits to federal prosecutors who were already empowered to secure state prisoners by writ of *habeas corpus ad prosequendum*.

Read against this background, the language of several provisions of Article IV raises severe doubt that Congress intended to subject federal prosecutions maintained with the aid of writs of *habeas corpus ad prosequendum* to the terms of the Agreement. For example, the speedy trial provisions of Article IV(c) invoked by respondent here apply to "any proceeding made possible by this article." Although that lan-

guage seems appropriate in the case of a State receiving custody of a prisoner under the Agreement rather than through the cumbersome extradition process, it has no application when the federal government proceeds by the traditional writ of *habeas corpus ad prosequendum*. Production of state prisoners pursuant to the writ had been routine well before 1970 and was not in any sense "made possible" by federal subscription to the Agreement.

In addition, Article IV(a) provides that "there shall be a period of thirty days after receipt * * * before the request [for temporary custody] be honored, within which period the Governor of the sending State may disapprove the request * * *, either upon his own motion or upon motion of the prisoner." Were this provision deemed applicable to writs of habeas corpus, it could severely limit the efficacy of an instrument that this Court has recognized as a "necessary * * * tool for jurisdictional potency as well as administrative efficiency." *Carbo* v. *United States*, 364 U.S. 611, 618.[13]

[13] While the Court in *Carbo* left open the question whether the nationwide enforceability of the writ of habeas corpus depended upon cooperation by the States (364 U.S. at 621, n. 20), it seems strained at best to conclude that Congress abandoned any claim that the writ constitutes compulsory process by adopting the Agreement or that it thereby redefined the writ as an administrative "request" subject to disapproval by the Governor of a sending State. Before Congress is held to have imposed such limitations on exercise of the writ, the statute or legislative history should indicate a clear intention to do so. *Rosencrans* v. *United States*, 165 U.S. 257, 262-263; see *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-169. The legislative history of the Agreement contains no suggestion of any such congressional intent. As the Fifth Circuit noted in *United States* v. *Scallion*, 548 F.2d 1168, 1173, the committee reports simply do not mention the writ.

2. The conclusion of the court of appeals that Congress intended in 1970 to impose new and stringent conditions on use of the writ of *habeas corpus ad prosequendum* by federal prosecutors also is inconsistent with Congress' enactment four years later of the Speedy Trial Act of 1974. In that legislation Congress included specific provisions governing the interjurisdictional transfer of a prisoner "charged with an offense [and] serving a term of imprisonment in any penal institution." 18 U.S.C. (Supp. V) 3161(j)(1). The Act requires the government either to "undertake to obtain the presence of the prisoner for trial" or to "cause a detainer to be filed with the person having custody of the prisoner," who is then obliged to inform the prisoner of the detainer and of his right to demand a trial. If such a demand is made, the government must promptly seek to obtain the prisoner's presence. 18 U.S.C. (Supp. V) 3161(j)(1) to (3).

Although these provisions in some respects echo those of the Agreement, in other and significant respects they are quite different. Thus, the Speedy Trial Act provides that trial must take place within 60 days of arraignment (18 U.S.C. (Supp. V) 3161(c)) while the Agreement provides that trial must occur within 120 days of arrival of the prisoner in the receiving State (Article IV(c)). On the other

hand, the Act has elaborate tolling provisions, which the Agreement does not. Similarly, the Agreement provides that the prisoner may not be returned to the sending state before trial (Articles III(D), IV(e)); the Act has no such provision.

Nothing in the language or legislative history of the Speedy Trial Act suggests a belief by Congress that the United States was already operating under a comprehensive scheme governing the federal trial of state prisoners—which the Agreement, as construed by the court of appeals here and in *Mauro*, would be. Indeed, the legislative history refers only to similar arrangements among States and suggests by negative implication that the federal government was not thought to be subject to comparable restrictions. There is no evidence of congressional recognition of the potential redundancy of this portion of the Speedy Trial Act. Although the enactments of a later Congress are not conclusive regarding the intent of an earlier Congress, the Speedy Trial Act nevertheless makes less tenable the proposition that Congress, in adopting the Agreement, had intended to define the exclusive terms upon which the federal government might obtain custody of prisoners for prosecution. See *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977, slip op. 6-7.

3. The court of appeals, in holding that the writ *ad prosequendum* becomes a "request" under the Agreement once a detainer has been lodged, stressed that the Agreement was intended to remedy the negative effects of outstanding detainers upon pro-

grams of prisoner rehabilitation and noted the fact that "federal detainers form a large percentage of all detainers outstanding" (App. A, *infra*, p. 20a). That reasoning, however, provides little basis for subjecting the United States to Article IV's conditions on cooperative transfers between member States. As previously noted, Article III provides that a prisoner must receive notice of any detainer lodged against him and that he may thereafter request, and must receive, speedy disposition of all charges to which the detainer relates. Thus the prisoner in any event retains the choice whether to endure the possible effects (if any) of an outstanding detainer or face prompt trial and perhaps conviction for another offense. So long as the prisoner is free to require disposition of charges under Article III of the Agreement, there is no compelling reason to attribute to Congress an intent to make federally-initiated transfers by writ of *habeas corpus ad prosequendum* subject to the restrictions of Article IV as well.[14]

4. Even if the provisions of Article IV(c) are applicable and were violated in this case, we believe that respondent waived any such violation by failing to present the issue to the district court. Respondent

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[14] The policies underlying the Agreement were fully served in this case. As the record illustrates, respondent's ability or desire to participate in rehabilitation programs was not seriously impaired by the existence of the detainer, for following his return to Massachusetts at his own request, respondent participated in a meaningful program and succeeded in earning a high school equivalency diploma. Additionally, there is no evidence that respondent was hampered in preparing his defense as a result of the delay in proceeding to trial.

offered no explanation for his failure to raise this claim until his appeal, nor are there any exceptional circumstances present here which otherwise require that this omission be excused.[15] His failure to invoke the Agreement here in a timely fashion should have precluded the court below from considering his claim. This is particularly so because a timely assertion of the contention that his case was subject to the restrictions of Article IV of the Agreement might have alerted the prosecution and the district court to the problem and caused the proceedings to be conducted in conformity with the strictures of Article IV.

In *United States* v. *Scallion*, 548 F.2d 1168, 1174, the Fifth Circuit held, in considering a claim under the Agreement that it also rejected on other grounds, that the defendant had waived any violation of Article IV's speedy trial provisions "by failing to present the issue to the district court or this court prior to his amended petition for rehearing" (548 F.2d at 1174). The court noted (*ibid.*) that failure to raise even a constitutional speedy trial claim before or during trial has been held a waiver of that claim (see *United States* v. *Ferrara*, 458 F.2d 868, 875 (C.A. 2), certiorari denied, 408 U.S. 931; *Peo-*

[15] Respondent twice moved to dismiss the indictment on traditional speedy trial grounds, but he never invoked any right under the Agreement until his appeal. Respondent's motions to dismiss for an asserted violation of his constitutional speedy trial right should not be permitted to do service for his failure to raise in a timely manner the specific claim of noncompliance with the terms of the Agreement.

ples v. *Hocker*, 423 F.2d 960, 966 (C.A. 9); *Peterson* v. *United States*, 405 F.2d 102, 108 (C.A. 8), certiorari denied, 395 U.S. 938; see also *Barker* v. *Wingo*, 407 U.S. 514, 531-532) and that the defendant "ha[d] offered no explanation for his failure to raise the Agreement issue before the district court or earlier on his appeal * * *" (548 F.2d at 1174). Although the court of appeals in the present case did not discuss the government's waiver argument (see note 8, *supra*), its decision necessarily places it in conflict with the position of the Fifth Circuit.[16]

The importance of this separate issue depends, of course, upon the applicability of the Agreement in the first place. After the decision of the district court in *United States* v. *Mauro*, *supra*, numerous prisoners who had been obtained from state prisons by writ of *habeas corpus ad prosequendum* began asserting rights under the Agreement, often for the first time on appeal or on motions for collateral relief.[17] Should this Court hold that the Agreement

[16] In *United States* v. *Cyphers and Ferro*, C.A. 2, Nos. 76-1131, 76-1160, decided February 8, 1977, petition for rehearing and rehearing *en banc* denied on June 29, 1977, in which a detainer had been lodged against the defendant, the Second Circuit noted that there had been "no showing that [defendant] knew, prior to trial, that [a] detainer had been lodged against him" (slip op. 1745). Under those circumstances the court held that the defendant properly invoked the Agreement for the first time on appeal.

[17] We are informed by the United States Attorney for the Eastern District of New York that in that district alone approximately 20 prisoners have recently sought relief under 28 U.S.C. 2255, raising the applicability of the Agreement to transfers by writ of *habeas corpus ad prosequendum*.

applies to prosecutions aided by such transfers, the question whether defendants in those waived their rights by neglecting to raise the issue before or during trial would assume substantial importance. In that event, we would urge this Court to resolve the existing conflict between the Second Circuit and the Fifth Circuit on this issue.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.,
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JULY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 419—September Term 1976

(Argued November 5, 1976
Decided February 3, 1977)

Docket No. 76-1319

UNITED STATES OF AMERICA, APPELLEE

—against—

RICHARD T. FORD, DEFENDANT-APPELLANT

Before: MOORE, MANSFIELD AND MESKILL, *Circuit Judges.*

MANSFIELD, *Circuit Judge:*

After lodging a detainer against appellant with state prison authorities in Massachusetts, where he was incarcerated, the federal government, on March 24, 1974, used a writ of habeas corpus ad prosequendum to obtain appellant's presence in the Southern District of New York for purposes of arraignment

on charges arising out of a Middletown, New York, bank robbery.[1] Despite his repeated requests for a prompt trial and despite the fact that Article IV(c) of the Interstate Agreement on Detainers Act (Detainers Act)[2] requires trial within 120 days unless continuances are granted for good cause in open court, the imprisoned appellant was not tried until September 2, 1975, more than 17 months later. Because of the failure to comply with the speedy trial requirements of Article IV(c) and because Article V(c) of the Act mandates that in such event the indictment be dismissed with prejudice, we reluctantly reverse, with directions to dismiss the indictment.

Federal authorities arrested appellant in Chicago on October 11, 1973, on two federal warrants—one for bank robbery issued by the Southern District of New York and one for unlawful flight issued by the District of Massachusetts. The unlawful flight charge was dismissed but appellant also faced various state charges filed against him in Massachusetts. He was therefore turned over to Chicago authorities for extradition to Massachusetts for trial on state charges, and the federal warrant issued by the Southern Dis-

[1] Appellant was charged with bank robbery in violation of 18 U.S.C. § 2113(c), using firearms to commit the bank robbery in violation of 18 U.S.C. § 924(c)(1), transporting a stolen automobile from Massachusettes to New York two days prior to the bank robbery in violation of 18 U.S.C. §§ 2312 & 2, and conspiracy to commit the above offenses in violation of 18 U.S.C. § 371.

[2] Pub. L. No. 91-538, §§ 1-8, 84 Stat. 1397 (1970), reprinted in 18 U.S.C.A. app. at 111 (Supp. 1976).

trict for bank robbery was lodged with the Massachusetts authorities as a detainer. Appellant pleaded guilty to the Massachusetts charges and was sentenced to concurrent terms of 8 to 10 years.

On March 21, 1974, an indictment for bank robbery was filed in the Southern District of New York, and on March 24 a writ of habeas corpus ad prosequendum was used to obtain custody of appellant for arraignment. On April 1, the government filed its notice of readiness for trial as required by Rule 4 of the Plan for the Prompt Disposition of Criminal Cases of that district. Two days later, however, the government filed the present susperseding indictment, naming in addition one James P. Flynn, who thereupon took flight. On April 15, appellant pleaded not guilty. Trial was set for May 28, 1974.

Shortly before trial was to commence, on May 17, the government requested the first of what was to become a long series of delays, moving to adjourn the trial for 90 days or until Flynn was apprehended, whichever came first, and supporting its motion by sealed affidavit. Over appellant's vigorous protests, the motion was granted and trial was set for August 21. Following the granting of the adjournment, appellant requested to be returned to Massachusetts custody, so that he and his attorney could more conveniently prepare for trial and because his family was in Massachusetts. He was returned on June 14, 1974.

In August, after the original judge, Judge Bauman, resigned from the bench, the case was assigned

to Judge Motley. Without explanation, the trial date was postponed to November 18. On November 1, the government again moved for an adjournment of 90 days within which to ap prehend appellant's co-defendant, again supporting its motion by sealed affidavit. On November 4 the defense moved to dismiss the indictment on the ground that appellant had been denied a speedy trial. The district court denied the speedy trial motion and granted the further adjournment, setting trial for February 18, 1975.

On the date set for trial, however, the trial judge was engaged in another trial. Despite the fact that we had recently emphasized that calendar congestion could not justify delay of a criminal trial and stated that under such circumstances the trial judge should *sua sponte* transfer the case to another judge for prompt trial,[3] trial was postponed another four months, to June 11. The defense reiterated its speedy trial objections. In the following month the Southern District of New York undertook a crash program for civil cases, to begin June 1. When the government sought to ascertain whether appellant's trial would be affected, Judge Motley, *sua sponte*, set a new trial date of September 2, 1975. Defense counsel was subsequently notified.

On August 8 the government obtained appellant from Massachusetts for trial by way of a second writ of habeas corpus ad prosequendum. At the beginning of trial appellant against moved for a dismissal of

[3] *United States* v. *Drummond*, 511 F.2d 1049, 1053 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975).

the indictment for failure to provide a speedy trial. This motion, like his first, was denied. Appellant was convicted on all counts and was sentenced to concurrent 5-year terms. Judge Motley recommended that the federal terms be allowed to run concurrently with the Massachusetts state terms appellant was already serving.

Discussion

Because we uphold appellant's claims under the Detainers Act, we need not discuss his other claims.[4] Many of the questions treated by the government here as open were recently settled in this circuit by our decision in *United States* v. *Mauro*, Slip Opin. at 265 (2d Cir. Oct. 26, 1976) (Dkt. Nos. 76-1251, 76-1252), where we held that under the Detainers Act the United States is bound by the statute's definition of it as both a sending and a receiving "State" and that the writ of habeas corpus ad prosequendum constitutes a "detainer" and a "request" by a prosecuting authority within the meaning of the Act, with the present author dissenting in that case from the majority's holding that a writ of habeas corpus ad prosequendum constitutes a "detainer." The government here, however, has conceded that appellant in this case was subject to a detainer, separate and apart

[4] In addition to his Detainer Act arguments, appellant claims that the government failed to file a notice of readiness for trial of its second indictment within six months as required by Rule 4 of the Plan for Prompt Disposition of Criminal Cases of the Southern District of New York and failed to accord him a speedy trial as required by the Sixth Amnedment.

from the writ, filed by it with the Massachusetts authorities.[5] Whether the writ independently constitutes a detainer, therefore, is not at issue here.

Granting that appellant here was subject to a "detainer" and that he was obtained by the federal authorities through a "request" as that term is used in Article IV(a) of the Act, under *Mauro* it is clear that the Detainers Act applies. Strictly speaking, this case therefore presents only two questions under the Act: (1) whether the Act was violated and, (2) if so, whether such violation warrants reversal of the conviction below. Because the government argues strenuously that the writ of habeas corpus cannot constitute a "request" under Article IV of the Act, however, we will begin with a review of the reasons for our disagreement with the government's position.

The government's argument rests upon a proviso in Article IV(a) to the effect that, after receipt by appropriate state authorities of a request from another jurisdiction for custody of a prisoner, there shall be a 30-day waiting period during which the governor of the sending state may disapprove the request and thus in effect dishonor it.[6] If a habeas writ

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[5] Warrants are commonly used as detainers. See Note, 48 Column. L. Rev. 1190, 1190-91 & nn.6-7 (1948).

[6] The text of the proviso reads as follows:

> "*And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner."

Article IV(a).

were treated as a "request," the argument goes, the effect would be a *sub silentio* partial repeal of 28 U.S.C. § 2241(c)(5), which authorizes a federal court to command a state custodian to turn over a prisoner to federal authority, presumably without delay or the right to disapprove.[7] Since a partial repealer of that section should not lightly be inferred, see *Rosencrans* v. *United States*, 165 U.S. 257 (1897), the argument goes, the writ should not be held to constitute a "request," and therefore the government here should be freed from the trial limitations of the Detainers Act.

Although the government's argument might at first blush appear to have some theoretical appeal, the history and purpose of the Act indicates that the Article IV(a) proviso was aimed merely at preserving the existing law with respect to interstate transfers, under which the governor of the sending state might refuse to turn over a prisoner to another state, as distinguished from federal authorities. However, regardless of the reach of that proviso—and this issue is not before us, since the Governor of Massachusetts has never refused to honor the federal writ of habeas corpus commanding that Ford be produced—a review

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[7] 28 U.S.C. § 2241(c)(5) provides:

> "The writ of habeas corpus shall not extend to a prisoner unless— . . . (5) It is necessary to bring him into court to testify or for trial."

of the structure and purposes of the Detainers Act makes it abundantly clear that its speedy trial provisions were intended to apply to the federal government as a "State" under the Act.

The Detainers Act was originally drafted in response to a variety of problems arising out of the then unregulated system of detainers commonly used where one or more jurisdictions had charges outstanding against a prisoner held by another jurisdiction. Under that system, once one of the jurisdictions had tried and convicted him the other jurisdictions, instead of trying him on their charges, would simply file detainers with the prison authorities holding him. The detainers would serve to notify the prison authorities that charges were pending against the prisoner elsewhere. Upon the prisoner's completion of the first prison term, the second jurisdiction could bring the defendant to trial on its own charges and, should a conviction be obtained, still other jurisdictions desiring to press charges might then file detainers with the prison where he was next incarcerated.

The disadvantages and potential abuses of this system were many.[8] Prison authorities often accorded

[8] The detainer system has evoked a considerable amount of critical controversy. See, e.g., Hincks, The Need for Comity in Criminal Administration, Fed. Prob. 3 (July-Sept. 1945); Bennett, The Correctional Administrator Views Detainers, Fed. Prob. 8 (July-Sept. 1945); Perry, Effect of Detainers on Sentencing Policies, Fed. Prob. 11 (July-Sept. 1945); Heyns, The Detainer in a State Correctional System, Fed. Prob. 13 (July-Sept. 1945); Bates, The Detained Prisoner and His Adjustment, Feb. Prob. 16 (July-Sept. 1945); Note, The

detainers considerable weight in making decisions with respect to the terms and conditions of the prisoner's incarceration and release on parole. Sometimes the prisoner would automatically be held under maximum security.[9] Sometimes he would be ineligible for special work programs, athletic programs, release for visits to relatives' death beds or funerals, or special minimum security facilities.[10] Often detainers pre-

Detainer: A Problem in Interstate Criminal Administration, 48 Column. L. Rev. 1190 (1948); Donnelly, The Connecticut Board of Parole, 32 Conn. B.J. 26, 45-48 (1958); Bennett, "The Last Full Ounce," Fed. Prob. 20 (June 1959); Comment, The Detainer System and the Right to a Speedy Trial, 31 U. Chi. L. Rev. 535 (1964); Note, Convicts—The Right to a Speedy Trial and the New Detainer Statutes, 18 Rutgers L. Rev. 828 (1964); Schindler, Interjurisdictional Conflict and the Right to a Speedy Trial, 35 U. Cin. L. Rev. 179 (1966); Note, Detainers and the Correctional Process, 1966 U. Wash. L. Rev. 417; Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions, 77 Yale L.J. 767 (1968).

[9] See, e.g., Note, 1966 Wash. U.L.Q. 417, 418 n.10. In *United States* v. *Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961), a 19-year old defendant was sent to a "maximum medium" institution while his 20-year old co-defendant was sent to an institution for youthful offenders, solely because of a charge pending against the former.

[10] See, e.g., *United States* v. *Candelaria*, 131 F. Supp. 797, 799, S.D. Cal. 1955) (because of detainer, defendant denied trusty status, parole, outside work, good inside work assignments); *United States* v. *Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961) (outside work and good inside work assignments); *State* v. *Baker*, Crim. No. 85611 (C.P. Hamilton Cty. Ohio, March 30, 1966) (federal honor farm rights, good behavior job privileges); Note, 48 Colum. L. Rev. 1190, 1192 & n.19 (1948) (trusty status); Donnelly, 32 Conn. B.J. 26, 47 (1958) (trusty status, transfers to farms and work

cluded the granting of parole.[11] Despite these serious consequences, virtually any law enforcement officer—prosecutor, policeman, or judge—could file a detainer without any procedural prerequisites.[12] No pending

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camps); Note, 1966 Wash. U.L.Q. 417, 418-19 & nn.11-16, 421-22 n.22 (transfers to minimum security areas, trusty status, job assignments, honor camps, athletic contests, visits to death beds or funerals, Christmas discharge). See also Note, 18 Rutgers L. Rev. 828, 835 (1964); Schindler, 35 U. Cin. L. Rev. 179, 181 (1966).

[11] See, e.g., *United States* v. *Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961); *Pellegrini* v. *Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955); *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762, 763 (1938); *State* v. *Kalkbrenner*, 263 Minn. 245, 116 N.W.2d 560 (1962); *Jones* v. *State*, 164 So.2d 799, 800 (Miss. 1964); *State* v. *Milner*, 78 Ohio L. Abs. 285, 286, 149 N.E.2d 189, 190 (C.P. Montgomery Cty. 1958); *Cane* v. *Berry*, 356 P.2d 374 (Okla. Crim. App. 1960); Hincks, Fed. Prob. 3, 3 (July-Sept. 1945); Heyns, Fed. Prob. 13, 14 (July-Sept. 1945); Note, 48 Column. L. Rev. 1190, 1193 & n.22 (1948); Donnelly, 32 Conn. B.J. 26, 47 (1958); Note, 1966 Wash. U.L.Q. 417, 420-21 & nn.17-21. See also Note, 18 Rutgers L. Rev. 828, 835 (1964). The United States Board of Parole changed its automatic denial policy to one of individual evaluation in 1954. Bennett, Fed. Prob. 20, 22 (June 1959).

[12] See, e.g., *State ex rel. Faehr* v. *Scholar*, 106 Ohio App. 399, 155 N.E.2d 230 (1958) (denying mandamus to force chief of police to file affidavit and warrant against petitioner or, in the alternative, to withdraw detainer); Schindler, 35 U. Cin. L. Rev. 179, 181 & n.9 (1966); Note, 1966 Wash. U.L.Q. 417, 417 & nn.3-4 James Bennett, Director of the Federal Bureau of Prisons, wrote in 1945:

> "The experienced prison warden knows that it is easy to file a 'hold' against a prisoner for the slightest cause and without the necessity of making out a prima-facie case. Indeed many police departments and sheriffs can file them merely on suspicion. No matter what the basis,

indictment or other formal notification of charges was generally required. Indeed, it was estimated that as many as 50% of all detainers were allowed to lapse on the prisoner's release, without any attempts at prosecution by the jurisdiction that had filed the detainer.[13] There were even cases in which the only reason the detainer had been filed was to increase the severity of the prisoner's sentence.[14] Thus de-

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> they all operate alike to prevent parole, intensify custody precautions, and increase tensions."

Bennet, Fed. Prob. 8, 9 (July-Sept. 1945). See also *People* v. *Bryarly*, 23 Ill.2d 313, 178 N.E.2d 326 (1961) (detainer despite announced intention of state not to prosecute); *Crow* v. *United States*, 323 F.2d 888 (8th Cir. 1965) (detainer based on complaint, not indictment).

[13] Commissioners' Preface to Uniform Mandatory Disposition of Detainers Act, 9B U.L.A. 363, 364 (1966); Note, 18 Rutgers L. Rev. 828, 835 (1964). Director Bennett estimated that in fiscal year 1958, of 325 detainers disposed of at one federal prison, 211 were abandoned without trial, and only 114 were executed. He commented, "The nuisance value of detainers is illustrated by the 211 detainers lifted at Leavenworth during the year, usually about the time the prisoners involved were finishing their sentences." Bennett, Fed. Prob. 20, 21 (June 1959).

[14] See *People* v. *Kenyon*, 39 Misc.2d 876, 879, 242 N.Y.S.2d 156, 159 (Schuyler Cty. Ct. 1963); Note, 1966 Wash. U.L.Q. 417, 423; Note, 77 Yale L.J. 767, 772-73 & nn.43-44 (1968). Sanford Bates, Commissioner of the New Jersey Department of Institutions and Agencies, in the 1945 symposium that ultimately led to the promulgation of the Agreement wrote of federal abuse of the detainer system:

> "There have been instances, fortunately rare, where Federal judges or prosecuting attorneys have filed warrants against a committed defendant for the sole purpose of

tainers imposed major unjustifiable hardships on prisoners, and, prior to adoption of the Agreement on Detainers, there was nothing a prisoner could do about them.

In addition, the pending charges forming the basis of a detainer might themselves significantly impede the development of a coherent program for the prisoner's punishment and rehabilitation. Often the various charges would arise out of a single criminal episode or out of events occurring within a short period of time. Instead of permitting coordination of sentencing and rehabilitation, the old detainer system often inhibited fair sentencing and effective rehabilitation. The first judge, in sentencing a defendant against whom a detainer had been lodged, would have to decide whether to disregard the other pending alleged offenses or lengthen the sentence to take those offenses into account. The other offenses, if proven, would clearly be relevant in determining whether the offense which was to be the subject of the first sentence was an isolated incident and what length of custody might be necessary for the defendant's re-

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preventing parole consideration in his case. I have known of cases where two separate charges were filed for the same set of acts; a sentence was imposed on one of them, prosecution suspended on the other, and a warrant filed in the institution to which the defendant was sent with no intention of enforcing it but for the mere purpose of delaying parole."

Bates, Fed. Prob. 16, 17 (July-Sept. 1945). Cf *Cane* v. *Berry*, 356 P.2d 374 (Okla. Crim. App. 1960) (allegations of such abuse).

habilitation. On the other hand, if the judge meted out a long sentence, taking the other offenses into account, there was nothing to prevent other jurisdictions, after they had tried and convicted the defendant on the pending charges, from punishing the defendant further for those offenses.[15] Since, by the nature of the detainer system, the sentences would be served consecutively, the prisoner would then serve a total sentence longer than that intended by the first sentencing judge.[16] Similarly, parole boards and prison authorities found it difficult to formulate the prisoner's rehabilitative program, since they were forced to act without knowing whether the prisoner would be convicted on the other pending charges.[17]

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[15] For a discussion of the problems facing sentencing judges under the detainer system, see Hincks, Fed. Prob. 3, 3-6 (July-Sept. 1945); Bennett, Fed. Prob. 8, 8-9 (July-Sept. 1945); Perry, Fed. Prob. 11, 11-12 (July-Sept. 1945); Bates, Fed. Prob. 16, 17 (July-Sept. 1945); Donnelly, 32 Conn. B.J. 26, 46 (1958).

[16] See 1966 Wash. U.L.Q. 417, 423. In *United States* v. *Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955), the court had originally sentenced the defendant to a term of five years. When a detainer was filed and it became evident that local authorities were going to prosecute defendant again for the same crime, the court on its own motion reduced the sentence to 60 days.

[17] See Hincks, Fed. Prob. 3, 4 (July-Sept. 1945); Note, 48 Column. L. Rev. 1190, 1192 & n.18 (1948); Note, 1966 Wash. U.L.Q. 417, 422. New Jersey's Commissioner Bates explained:

> "One of the essential and indispensable elements of good parole is that a program should be arranged in advance of release. The parole board must be assured of employment which is *bona fide* and suitable to the man being

This same uncertainty also often adversely affected the prisoner's attitude towards his own rehabilitation. No matter how well he might behave and how zealously he might work towards his own rehabilitation, there was no way, as long as a detainer had been lodged and was pending against him, whereby he could count on release within a given period.[18] The

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released, and also it must be satisfied that he is to have as good a home as possible under the circumstances. If the board does not know whether the man is to serve more time or not, it is difficult to arrange such a program. We have no business to annoy employers by importuning them for a job for an inmate and then not having the inmate show up as promised."

Bates, Fed. Prob. 16, 17 (July-Sept. 1945). It was for this reason that prison and parole officials were in the forefront of the movement to reform the detainer system. See, e.g., Bates, *supra*; Bennett, Fed. Prob. 8 (July-Sept. 1945); Fed. Prob. 20 (June 1959) (Director, Federal Bureau of Prisons); Heyns, Fed. Prob. 13 (July-Sept. 1945) (Director, Michigan Department of Corrections); Donnelly, 32 Conn. B.J. 26 (1958) (Member, Connecticut Board of Parole). The Federal Bureau of Prisons urged as early as 1963 that the federal government become a party to the Agreement. See Note, 18 Rutgers L. Rev. 828, 856 n.236 (1964).

[18] See Hincks, Fed. Prob. 3, 4 (July-Sept. 1945); Note, 18 Rutgers L. Rev. 828, 836 & n.63 (1964); Note, 77 Yale L.J. 767, 770 & n.22 (1968). Commissioner Bates recounted one extreme example:

"I recall the case of a man who came before the board of parole at a prison in New York who had no less than 17 warrants pending against him, most of them for forging small checks. Undoubtedly his philosophy had been, after he forged the first one and placed the proceeds on the wrong horse, that he wouldn't get punished much more for two checks than for one and he kept up that process

system also tended to eliminate the possibility of concurrent sentencing, even when the charges in the various jurisdictions all stemmed out of the same criminal episode or occurred within a short period of time.[19]

Moreover, the prisoner subject to a detainer was handicapped by delay in preparing for trial of the charge upon which it was based. As in all cases of trial delay, witnesses might die, evidence disappear, and memories fade. While the state could gather its evidence and preserve it for an eventual trial, the prisoner, confined in another jurisdiction, was often unable to do so, particularly if he could not afford to

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until finally apprehended. When granted parole, of course, he had to meet each of these warrants in turn and he wasn't as lucky as some because the first judge whom he met was a tough one and sent him back to prison again for two and a half to five years, but then the man had only 16 warrants left to meet. If that's to be his fate on each of them, it doesn't look as though he is ever to have the chance of proving that he has been rehabilitated and I doubt if he ever will be."

Bates, Fed. Prob. 16, 16-17 (July-Sept. 1945).

[19] See *State* v. *Milner*, 78 Ohio L. Abs. 285, 288, 149 N.E.2d 189, 181 (C.P. Montgomery Cty. 1958); Note, 18 Rutgers L. Rev. 828, 849 (1964); Schindler, 35 U. Cin. L. Rev. 179, 182 (1966); Note, 77 Yale L.J. 767, 770 & n.26 (1968). It has been noted that this fact may even deter prosecutors from according defendants a speedy trial, since early prosecutions will merely result in concurrent sentences, whereas delayed prosecutions cannot. See Comment, 31 U. Chi. L. Rev. 535, 540-41 (1964).

retain counsel.[20] Indeed, sometimes he would not even be informed that charges were pending against him.[21]

Finally, even when all jurisdictions concerned were otherwise willing to permit a temporary transfer to accord the prisoner a prompt trial on pending charges, such transfers were hampered by a lack of a uniform set of rules as to the mechanics of such transfers. Arrangements would have to be made for payment of the cost of transfers, prisoner upkeep, pursuit and recovery in the event of escape and prompt return.[22] There was no guarantee to the sending state that the receiving state would try and

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[20] See, e.g., *Nickens* v. *United States*, 323 F.2d 808, 813 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964) (Wright, *J.*, concurring); *Taylor* v. *United States*, 238 F.2d 259, 262 (D.C. Cir. 1956); *United States* v. *Provoo*, 17 F.R.D. 183, 203 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955); Comment, 31 U. Chi. L. Rev. 535, 537 n.14 (1964); Schindler, 35 U. Cin. L. Rev. 179, 182 (1966); Note, 18 Rutgers L. Rev. 828, 834 (1964); Note, 1966 Wash. U.L.Q. 417, 423-24; Note, 77 Yale L.J. 767, 769 (1968).

[21] See, e.g., *Fouts* v. *United States*, 253 F.2d 215, 218 (D.C. Cir. 1958); *Taylor* v. *United States*, 238 F.2d 259, 261 (D.C. Cir. 1956); *Ex parte State ex rel. Attorney General*, 255 Ala. 443, 52 So.2d 158, 161 (1951); *Pellegrini* v. *Wolfe*, 225 Ark. 359, 366, 283 S.W.2d 162, 165-66 (1955) (Robinson, *J.*, dissenting); Schindler, 35 U. Cin. L. Rev. 179, 182 n.10 (1966); 18 Rutgers L. Rev. 828, 844 (1964).

[22] Director Bennett noted in 1959: "While under present procedures a prosecutor in one state can secure for trial an offender imprisoned in another state, this requires a special contract with the executive authority of the incarcerating state, a method burdened with so much red tape that it is seldom used." Bennett, Fed. Prob. 20, 22 (June 1959). See also Note, 18 Rutgers L. Rev. 828, 849 (1964).

return the prisoner promptly—or return him at all. Indeed, at least one state refused to participate in such transfers because of a tendency on the part of receiving jurisdictions not to return the borrowed prisoners.[23]

It was to remedy these problems that the present Interstate Agreement on Detainers was adopted in 1970 on behalf of the United States and the District of Columbia by way of the Interstate Agreement on Detainers Act.[24] The Agreement adopted by the Act provided the prisoner with a method of clearing detainers and charges outstanding against him and provided prosecutors with a uniform set of rules governing temporary transfers for purposes of trial. Under the Agreement, prison authorities must notify a prisoner immediately of any detainers lodged against him and must inform him of his rights under

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[23] See Note, 18 Rutgers L. Rev. 828, 849 & n.176 (1964).

[24] A brief history of the promulgation of the Interstate Agreement on Detainers is given in Bennett, Fed. Prob. 20 (June 1959).

The Joint Committee on Detainers (later entitled the "Committee on Detainers and Sentencing and Release of Persons Accused of Multiple Offenses"), sponsored by the Council of State Government, issued a statement of principles in 1948 and, in 1955 and 1956, a series of proposals. Drafts of the proposals were submitted to a conference sponsored by the Council of State Governments, the American Correctional Association, the National Probation and Parole Association, and the New York Joint Legislative Committee on Interstate Cooperation. Two drafts were approved. The first, "Disposition of Detainers Within the State," was proposed as a model statute for the resolution of detainer problems within a single jurisdiction.

the Agreement. Article III then affords him the right to demand trial on the charges underlying the detainer. In response to such a demand, the prison authorities must offer custody of the prisoner to the authorities that have lodged the detainer. Art. V(a). If the latter refuse to accept custody, the indictment on which the detainer is based must be dismissed with prejudice. Art. V (c). If instead they accept custody, they must try the prisoner within 180 days, unless a continuance is granted in open court. Art. III(a).

Article IV governs requests initiated by the prosecutor. In part, Articles IV and V alleviated the problems that previously had plagued interjurisdictional transfers for purposes of trial. Trial must be commenced within 120 days (plus continuances for good cause granted in open court) and the prisoner returned as expeditiously as possible. Arts. IV(c) and V(e). Article V also governs the handling of expenses and escape. In part the limitations imposed by Article IV constitute necessary corollaries to those imposed by Article III, since without the Article IV limitations prosecutors would be able to avoid the limitations under Article III merely by arraigning the prisoner without any intention of granting a prompt trial, thereby circumventing the requirements of the Agreement.

Our interpretation of the Detainers Act should reflect Congress' purpose, as revealed in the foregoing history, which was to provide a comprehensive and coherent solution to a multiplicity of problems that had prior to the adoption of the Act beset prisoners,

prosecutors, judges, prison authorities, and parole boards alike under the old detainer system. Under the Act a prisoner can force the expeditious disposition of outstanding detainers and their underlying charges. Similarly prosecutors can more easily obtain prisoners for trial; judges and prison and parole authorities can more rationally administer punishment and rehabilitation. Whether or not the Act should apply to a case where the sole federal intervention is the issuance of a habeas writ, see, e.g., *United States* v. *Mauro*, Slip Opin. at 265 (2d Cir. Oct. 26, 1976) (Nos. 76-1251, 76-1252), the speedy trial provisions must surely apply to a state prisoner like Ford, against whom a federal detainer was lodged for years. To hold that the proviso to Article IV(a) precludes application of those provisions in such a case would be to stand the Act on its head.

The Article IV(a) proviso plays a very minor role in the Act's general structure. One of the problems involved in formulating a workable transfer procedure among states was to preserve states' rights to refuse extradition, and it is this right that the Article IV(a) proviso embodies.[25] While there is some dispute as to the extent of a state's right to refuse to comply with a federal writ of habeas corpus ad prosequendum,[26] there is no evidence that the Article IV

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[25] See 31 U. Chi. L. Rev. 535, 552 (1964).

[26] Compare *United States* v. *Mauro*, Slip Opin. at 280 & n.1 (2d Cir. Oct. 26, 1976) (Nos. 76-1251, 76-1252) (Mansfield, *J.*, dissenting), and Schindler, 35 U. Cin. L. Rev. 179, 191-92 & n.46 (1966), with *United States* v. *Mauro*, *supra*, at 271, and

(a) proviso and its adoption by Congress were intended to augment or diminish that right in any way; it rather appears that they were merely intended to preserve prior law with respect to interstate transfers.

Thus we are asked to take a hypothetical and possibly non-existent conflict between a minor provision of the Act which relates to transfer mechanics (the Art. IV(a) proviso) and prior federal law (28 U.S.C. § 2241) and to use it as the touchstone for an interpretation of the rest of the Act that would vitiate its operation insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ.[27] This, in turn, would substantially impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding.[28] Given this choice, we are con-

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Comment, 31 U. Chi. L. Rev. 535, 541 (1964). The Supreme Court has reserved the issue. *Carbo* v. *United States*, 364 U.S. 611, 621 n.20 (1961). While the author of the present opinion adheres to his position in *Mauro*, we need not decide the question here.

[27] The government here has so conceded.

[28] See Note, 77 Yale L.J. 767, 775 & n.73 (1968). Available statistics are spotty but illustrative. For example, in 1963, of 96 detainers filed in a leading Illinois prison, 52 were filed by the federal government (54%). Comment, 31 U. Chi. L. Rev. 535, 540 & n.30 (1964). In the first half of 1962, the federal government was responsible for 70 out of 222 out-of-state detainers filed in California (32%). Note, 18 Rutgers L. Rev. 828, 857 & n.238 (1964). The record for Michigan

strained to hold that, whether or not a writ of habeas corpus ad prosequendum constitutes a "detainer," see *United States* v. *Mauro*, *supra*, once a federal detainer has been lodged against a state prisoner the habeas writ constitutes a "written request for temporary custody" within the meaning of Article IV of the Detainers Act.

Turning to whether the government violated the limitations of the Act in this case, Article IV(e) provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Appellant argues that the government violated this provision by returning him to Massachusetts custody on June 14, 1974, prior to trial. The provision, however, which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable. Here, appellant himself requested the

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State Prison at Jackson in 1944, used as an example by Director Heyns at the 1945 symposium, was similar: Of 109 detainers filed, 46 were filed by federal officials (42%). Heyns, Fed. Prob. 13, 15 n.1 (July-Sept. 1945).

transfer and by doing so waived his objection to it under Article IV(e)."[29]

Article IV(c), however, provides in addition that:

> "[T]rial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open Court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

Although appellant waived his right not to be returned prior to trial, he did not thereby waive his right to a speedy trial. On the contrary, beginning shortly after his arrest he repeatedly insisted on a prompt trial. Almost immediately after his arrest he sent a letter to the United States Attorney requesting that he be tried as expeditiously as possible. He objected to each continuance or delay in the trial when he was afforded an opportunity to object and twice moved for dismissal on speedy trial grounds. His request to be returned to Massachusetts custody was made only after it became evident that trial would be substantially delayed at the government's request.

Custody of appellant was obtained pursuant to the writ on April 1, 1974. Appellant was not tried until

[29] In this case we need not decide whether the failure of a prisoner to express a preference as to the place of his incarceration pending trial, either through ignorance of his statutory right or otherwise, would nevertheless constitute a waiver of that right.

September 2, 1975, more than 13 months beyond the expiration on July 30, 1974, of the 120 days permitted under Article IV(c). The question, therefore, is whether the 120-day period was extended through the granting of "necessary or reasonable" continuances, "for good cause shown in open court, the prisoner or his counsel being present."

Trial was originally set for May 28, 1974, well within the 120-day period. In response to the government's request for a continuance in which to attempt to apprehend appellant's co-defendant, however, trial was postponed to August 21, 1974. The proceeding took place in open court, with both the defendant and his counsel present. The government's reasons for requesting the adjournment were set forth in a sealed affidavit filed with the court. While we do not believe that the public interest would be served by disclosure of the contents of that affidavit, we have reviewed it and hold that the continuance was "necessary" and "reasonable" and was granted "for good cause." The later delay from November 18 to February 18, 1975, also supported by sealed affidavit and also granted in open court, was similarly justified.[30]

The remaining delays, however, cannot be so justified. When Judge Bauman resigned and the case was transferred to Judge Motley, the trial date was post-

[30] We do not believe that the requirement of Article IV(c) that good cause be shown in open court was intended to preclude proceedings by way of sealed affidavit where circumstances warrant, but merely to prohibit *ex parte* and *sua sponte* continuances.

poned from August 21 to November 18, 1974, without explanation. Part of this delay may have been occasioned by the transfer of the case. The larger part, however, can only be accounted for on the assumption that Judge Motley's calendar was already full. As we have previously stated, under such circumstances it is the responsibility of the trial judge to reassign cases to assure defendants their right to a speedy trial. *United States* v. *Drummond*, 511 F. 2d 1049, 1053 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975). Similarly on February 18, 1975, the trial date set after the government's second motion for a continuance, the trial judge found herself in the middle of another trial and, instead of reassigning the case to a judge able to accord the defendant a prompt trial, postponed the trial to June 11, 1975. Subsequently, because of a program undertaken by the court to dispose of civil cases, the trial judge *sua sponte* set a new trial date of September 2, 1975. None of these delays, which together total over nine months, were "necessary," "reasonable," or "for good cause" within the meaning of Article IV(c).

Not only were the delays unjustified, but two of the three were not granted "in open court, the defendant or his counsel being present." Both the adjournment from August 21 to November 18, 1974, and the adjournment from June 11 to September 2, 1975, were granted *sua sponte* without any type of formal hearing. We have previously emphasized, outside of the context of the Detainers Act, the importance of granting the defendant an opportunity to be

heard before granting an extended, criminal trial continuance. *United States* v. *Didier*, Slip Opin. at 73, 86 (2d Cir. Oct. 13, 1976) (No. 76-1331.) The Detainers Act imposes similar requirements for similar reasons: unless the defendant is given an opportunity to participate, his speedy trial rights may be whittled away in the nonadversary context of ex parte communications between the government and the court. We therefore hold that appellant's rights to a speedy trial under Article IV(c) of the Detainers Act were violated here.

We are left with the question of whether such violations warrant reversal of the convictions below. Article V(c) of the Detainers Act dictates the answer:

> "[I]n the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending *shall* enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect." (Emphasis supplied).

Whatever might be our conclusion if such a provision did not exist,[31] the language actually enacted is

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[31] We note in this regard that appellant alleges that the detainer caused him to be denied certain opportunities during the years it was pending and deprived him of the opportunity to serve his entire federal sentence concurrently with the

mandatory on this court. We therefore reverse the conviction and remand the case for dismissal of the indictment with prejudice.

MOORE, *Circuit Judge* (dissenting):

I am greatly impressed by Judge Mansfield's most learned and exhaustive treatise on the history of, and the *raison d'etre* for, the enactment of the Interstate Agreement on Detainers Act.

However, turning to the facts of the case before us on appellate review, I find that after a jury trial before Judge Motley, the appellant Richard Ford was convicted of (1) bank robbery; (2) unlawful use of firearms; (3) transportation of a stolen automobile in interstate commerce; and (4) conspiracy. The robbery was committed at Middletown, New York on October 20, 1971. On November 11, 1971 a warrant for Ford's arrest was issued, but he remained a fugitive until October 11, 1973 when he was arrested by the FBI in Chicago, Illinois. On October 17, 1973 the FBI turned him over to Illinois authorities for extradition to Massachusetts for trial resulting from a 1968 escape from prison. On February 8, 1974, after a guilty plea to the Massachusetts charges, Ford was sentenced to concurrent terms of eight to ten

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state sentence. Such prejudice, were appellant able to substantiate his allegations, was specifically recognized in *Smith* v. *Hooey*, 393 U.S. 374 (1968).

years, which sentence he is presently serving. At this point begin the events at issue before us.

On March 21, 1974 Ford was charged in the Southern District of New York with the bank robbery and related charges above mentioned. To enable him to plead promptly, Ford was produced on April 1, 1974 in New York pursuant to a writ issued on March 25, 1974 for that purpose. At the arraignment Ford requested his return to Massachusetts to prepare for his trial there and to be with his family. The request was granted. Despite this return, the Government was apparently ready to proceed immediately in New York, a notice of readiness having been filed on April 1, 1974.

Ford was not alone in his Middletown robbery. On April 3, 1974 a superseding indictment was obtained to include James Flynn, a fugitive. Again Ford came to New York to plead, and again he requested a return to Massachusetts. Trial was set for May 28, 1974.

It may well be argued that we should not be concerned with the gravity of Ford's alleged crimes. Nor is this the time or place to debate the wisdom of speedy trial legislation enacted without any provision by way of judges available for its implementation. However, from our appellate ivory tower, we ought at least to scan the practicalities of the situation.

The majority have found that Ford himself waived his objections under Article IV(e) of the Interstate Agreement on Detainers Act. They then turn to Article IV(c), containing the words so well known to the

law as entirely dependent on the facts, namely, "for good cause" and "necessary or reasonable". On such facts as are known to them, they say that until February 18, 1975 the continuance was "necessary" and "reasonable" and was granted "for good cause".

At this point apparently the determinative facts become of little, if any, importance to the majority. We know that Judge Motley on February 18, 1975 was in the midst of effecting justice for another person—probably in a speedy trial. We also know that under the individual calendar system this was Judge Motley's case. The majority fault Judge Motley for postponing the case on June 11, 1975 "instead of reassigning the case to a judge able to accord the defendant a prompt trial". This statement assumes Judge Motley's power to do so and assumes that, after canvassing the other twenty-five judges a calendar-free judge could have been found. With all of our other duties, I do not regard it as a function of the Court of Appeals to act as a calendar clerk for the district courts.

In short, although there has been factual support for the majority's opinion that the delays up to February 18, 1975 were reasonable and necessary, there are no facts upon which to base a contrary assumption thereafter despite easy access thereto.

I do not find any violation of Ford's rights under the guidelines of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Not being willing to thwart the jury's determination of guilt by post-conviction calendar technicalities, particularly where no showing of prejudice

therefrom has been made, I would affirm the convictions, or at most remand for a factual determination of the essentials of "good cause" and "necessary or reasonable".

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of February one thousand nine hundred and seventy-seven.

Present: HON. LEONARD P. MOORE

HON. WALTER R. MANSFIELD

HON. THOMAS J. MESKILL

Circuit Judges

76-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES PATRICK FLYNN, DEFENDANT

RICHARD THOMPSON FORD, a/k/a VINCENT A. THOMAS, a/k/a JOHN A. AUGUST, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by
Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-seven.

Present: HON. LEONARD P. MOORE

HON. WALTER R. MANSFIELD

HON. THOMAS J. MESKILL

Circuit Judges

76-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES PATRICK FLYNN, DEFENDANT

RICHARD THOMPSON FORD, a/k/a VINCENT A. THOMAS, a/k/a JOHN A. AUGUST, DEFENDANT-APPELLANT

A petition for a rehearing having been filed herein by counsel for the appellee, United States of America,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-seven.

76-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES PATRICK FLYNN, DEFENDANT

RICHARD THOMAS FORD, a/k/a VINCENT A. THOMAS a/k/a JOHN A. AUGUST, DEFENDANT-APPELLANTS

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee, United States of America, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 238643 27

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,
Petitioner
—*v.*—
RICHARD T. FORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 8, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,
Petitioner
—*v.*—
RICHARD T. FORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Crim. 279

UNITED STATES OF AMERICA

v.

RICHARD THOMPSON FORD,
a/k/a Victor A. Thomas, a/k/a John A. August

DOCKET ENTRIES

DATE	PROCEEDINGS
3-21-74	Filed indictment.
4-1-74	Deft Ford appears (atty not present) Court directs a plea of not guilty Case assigned to Bauman, J. Deft Remanded. Deft produced on writ. Tenney, J.
4-1-74	Filed Govt's. notice of readiness for trial.
4-3-74	Filed affdvt and notice of motion for certain physical exemplars, to be furnish to USA by deft.
10-14-75	The deft having been convicted of four counts of a superceding indictment, 74 Cr. 336, and sentenced this date with respect to each count, the within indictment is DISMISSED for failure to prosecute. . . . Motley, J. . . .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Crim. 336 (S)

UNITED STATES OF AMERICA

v.

JAMES PATRICK FLYNN
RICHARD THOMAS FORD,
a/k/a Vincent A. Thomas, a/k/a John A. August

DOCKET ENTRIES

DATE	PROCEEDINGS

4-3-74 Filed indictment. (Superseding 74Cr279 and assigned to Bauman, J.)

4-5-74 Deft. prod. on Writ. No appearance by counsel. Pleading adjd to 4-15-74, Deft. consent to being fingerprinted. Assignment of counsel adjd. until 4-8-74. Writ adjd. to 4-15-74. TENNEY, J.

4-5-74 James P. Flynn—B/W ordered.
RICHARD T. FORD. Deft. (Atty Present) produced on writ. PLEADS NOT GUILTY. 10 days for motions. BAUMAN, J.

4-5-74 JAMES P. FLYNN—B/W issued.

4-25-74 RICHARD T. FORD—(Atty Present) Produced on Writ, Trial set for May 28-74. Writ adj to 5-28-74. Court held deft. in civil contempt. BAUMAN, J.

5-1-74 Filed notice of appearance by Robert Florsheim, 10 Columbus Cir. NYC., 586-3300.

DATE	PROCEEDINGS

5-17-74 Filed Govt. notice of motion to adjourn trial as to deft. Ford.

5-16-74 Filed one sealed envelope ordered sealed and placed in vault Room 602. BAUMAN, J.

5-22-74 Filed MEMO END on Govt. motion filed 5-17-74. Motion granted. Trial dated Aug. 21-74. So Ordered. BAUMAN, J.

• • • •

9-30-74 RICHARD T. FORD—Filed affdvt. & notice of motion for an order directing the Govt. to furnish all exculpatory evidence

11-4-74 JAMES PATRICK FLYNN—Filed 1 envelope ordered sealed and impounded and placed in vault in rm. 602 . . . . Motley, J.

11-6-74 RICHARD T. FORD.—Filed memo endorsed on motion filed: For the reasons set forth, in the record this date, The within motion is denied, So ordered Motley, J.

11-6-74 RICHARD T. FORD.—Filed memo endorsed on motion: The within motion is granted.

THE TRIAL OF THIS ACTION IS SCHEDULED to begin on Feb. 18, 1975 as to deft. Ford, So ordered. Motley, J.

11-4-74 Govt's motion to adjourn trial to 2-18-75 Granted. Deft Fords motion to dismiss indictment for lack of speedy trial DENIED . . . . MOTLEY, J.

• • • •

8-8-75 RICHARD FORD—Filed affdvt. of D.D. Buchwald, AUSA in support of a writ . . . Ret. 9-2-75.

8-20-75 Filed Govt's requests to charge. . . .

DATE	PROCEEDINGS

9-4-75 RICHARD T. FORD—Filed notice of motion to dismiss the indictment . . . With memo endorsed . . . . The motion to dismiss for lacl of speedy trial denied . . . Motley, J. . . .m/n

9-2-75 RICHARD THOMSON FORD—Jury trial began before Motley, J.

9-3-75 Trial cont'd.

9-4-75 Trial cont'd.

9-5-75 Trial cont'd.

9-8-75 Trial cont'd.

9-9-75 Trial cont'd. and concluded . . . Deft Guilty on all counts . . . P.S.I. ordered Sent. 10-14-75 . . . Writ satisfied . . . . Motley, J.

9-12-75 James Patrick FLYNN Closed statistically because
- ☒ defendant
- ☐ co-defendant
- ☐ witness

is a fugitive. In all other respects this case is still pending.

10-14-75 RICHARD THOMSON FORD—Filed Judgment (Atty. Ronald Chisholm, present) the deft is committed for imprisonment for a period of FIVE YEARS on each of counts 1, 2, 3 and 4 to run concurrently with each other . . . It is recommended that the Attorney Gen'l. pursuant to Section 4082 of Ti. 18, U.S. Code, arrange to have this sentence served concurrently with sentence deft is presently serving at Mass. State Prison, in so far as the time that can be served concurrently can be served . . . MOTLEY, J. . . . Ent. on 10-15-75.

11-6-75 R. T. FORD—Filed commitment & entered return Deft. delivered to MASS CORR. INSTITUTION.

* * * *

DATE	PROCEEDINGS

05-24-76 R. T. FORD—Filed notice of appeal from the judgment of conviction entered on the 14th day of October 1975 with memo end, Leave to appeal in forma pauperis is hereby granted; ordered that this appeal be filed nunc pro tunc as of October 20, 1975. MOTLEY, J. Mailed notice to deft. M.C.I. Norfolk P.O. Box 43 Norfolk, Mass. 02056 & U.S. Atty.

* * * *

Approved: _____

M. BLANE MICHAEL
Assistant United States Attorney

Before: HONORABLE GREGORY J. POTTER
United States Magistrate
Southern District of New York

UNITED STATES OF AMERICA

—*v*—

RICHARD THOMPSON FORD, DEFENDANT

COMPLAINT

Violation of 18 U.S.C. §§ 2113(a) and 2

SOUTHERN DISTRICT OF NEW YORK, ss:

MICHAEL NEVILLE, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and charges as follows:

On or about the 20th day of October, 1971, in the Southern District of New York, RICHARD THOMPSON FORD, the defendant, unlawfully, wilfully and knowingly, by force and violence and intimidation did take, from the person and presence of tellers of the Orange County Trust Company, Silver Lake Branch, Town of Wallkill, Route 211, Middletown, New York, certain sums of money belonging to and in the care, custody, control, management and possession of said bank, the deposits of which were then and there insured by the Federal Deposit Insurance Corporation.

The bases for deponent's knowledge and for the foregoing charge are in part, as follows: Investigations con-

ducted in the course of his official duties; a bystander who observed the getaway car was shown 14 photographs; from the group of photographs the bystander identified the photograph of defendant as the driver of the getaway car.

WHEREFORE, the deponent prays that a warrant may issue for the apprehension of the above named defendant and that he may be arrested and imprisoned, or bailed, as the case may be.

MICHAEL NEVILLE

Sworn to before me this 11th day of November, 1971.

TO THE PRESIDENT OF THE UNITED STATES

[Filed Jun. 26, 1974]

TO: WARDEN

MASSACHUSETTS CORRECTIONAL
INSTITUTION
WALPOLE, MASSACHUSETTS
and United States Marshal
Southern District of New York,
District of Massachusetts

GREETING: 74 Cr. 279

YOU ARE HEREBY COMMANDED to have the body of RICHARD THOMSON FORD now detained in the Massachusetts Correctional Institution Walpole, Massachusetts under your custody as it is said, under safe and secure conduct before the Judges of our District Court within and for the Southern District of New York, at the United States Court House, Foley Square, New York, New York, on April 1, 1974 at 10:30 o'clock in the forenoon, there to appear and plead to Indictment 74 Cr. 279, and immediately after the said RICHARD THOMSON FORD shall have been discharged or convicted and sentenced on said indictment, that you return him to the said Massachusetts Correctional Institution, Walpole, Massachusetts under safe and secure conduct, and have you then and there this writ.

WITNESS the Honorable DAVID N. EDELSTEIN, Chief Judge of the United States District Court for the Southern District of New York, at the United States Court House, Foley Square, New York, N.Y., this 25th day of March, 1974.

/s/ [Illegible]
Clerk
United States District Court
Southern District of New York

The within writ is hereby allowed.

/s/ Constance Baker Motley
United States District Judge

June 25, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—*v*—

RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas,"
a/k/a "John A. August," DEFENDANT

WRIT OF HABEAS CORPUS
AD PROSEQUENDUM ISSUE

74 Cr. 279

PAUL J. CURRAN
United States Attorney
Attorney for U.S.A.

30 March 74—I hereby certify and return that I have partially fulfilled this writ by transporting the within named Richard Thomson Ford from Walpole, Massachusetts Correctional Institution to Federal Detention House, West St., N.Y.C. and left original writ with Warden, FDH, West St., N.Y.C.

[Illegible]
U.S. Marshal SDNY

by [Illegible]
Dus. M., SDNY

6-14-74—I have this day received Richard T. Ford from FDH N.Y., N.Y. and on this same day remanded him to MCI, Walpole, Mass.

/s/ John A. Birknes, Jr.
/s/ [Illegible]
Dep.

USA-33s-523—Notice of Readiness for Trial
Rev. 12/3/70
JSR:ew

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 279

UNITED STATES OF AMERICA

—*v*—

RICHARD THOMSON FORD
a/k/a "Vincent A. Thomas,"
a/k/a "John A. August," DEFENDANT

NOTICE OF READINESS FOR TRIAL

SIRS:

PLEASE TAKE NOTICE that the United States will be ready for trial in this case as soon as the matter can be reached by the Court on or after April 1, 1974 subject to receiving ten days' advance notice of the actual date for trial.

Dated: New York, New York
April 1, 1974

Yours, etc.,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States of America

By: _____
JED S. RAKOFF (264-6420)
Assistant United States Attorney

TO: HONORABLE ARNOLD BAUMAN
United States District Judge

RONALD J. CHISHOLM, ESQ.
Three Center Plaza
Boston, Mass. 02108

JSR:ew
71-3397

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Crim 336(S)

[Filed Apr. 3, 1974]

UNITED STATES OF AMERICA

—*v*—

JAMES PATRICK FLYNN and
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas,"
a/k/a "John A. August," DEFENDANTS

INDICTMENT

COUNT ONE

The Grand Jury charges:

In or about October, 1971, in the Southern District of New York and elsewhere, JAMES PATRICK FLYNN and RICHARD THOMSON FORD (who was also known as Vincent A. Thomas and John A. August), the defendants, unlawfully, wilfully and knowingly did conspire and agree with each other and with other persons to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 3212, 2113(a) and 924 (c)(1).

It was part of this conspiracy that JAMES PATRICK FLYNN and RICHARD THOMSON FORD (who was also known as Vincent A. Thomas and John A. August) the defendants, would unlawfully, wilfully and knowingly transport in interstate commerce from Boston, Massachusetts to Middletown, New York, a motor vehicle, to wit, a Blue 1971 Plymouth Fury III bearing Massachusetts registration 43965F, knowing this motor vehicle to have been stolen.

It was further part of this conspiracy that JAMES PATRICK FLYNN and RICHARD THOMSON FORD (who was also known as Vincent A. Thomas and John A. August), the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation, would take from the person and presence of another, money in the approximate amount of $203,938, belonging to, and in the care, custody, control, management and possession of the Orange County Trust Company, Route 211, Middletown, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

It was further part of this conspiracy that JAMES PATRICK FLYNN and RICHARD THOMSON FORD (who was also known as Vincent A. Thomas and John A. August), the defendants, unlawfully, wilfully and knowingly would use firearms, to wit, a shotgun and two handguns, to commit a felony for which they may be prosecuted in a court of the United States, namely, the felony set forth in Count Three of this Indictment.

OVERT ACTS

In furtherance of this conspiracy, and to effect its objects, the following overt acts, among others, were committed by the defendants in the Southern District of New York:

1. On or about October 17, 1971, the defendant RICHARD THOMSON FORD (who was also known as Vincent A. Thomas and John A. August) resided at the "Sugar's Bungalows," Jersey Avenue, Greenwood Lake, New York under the assumed name of Vincent A. Thomas.

2. On or about October 18, 1971, the defendant JAMES PATRICK FLYNN resided in Room 123 of the Holiday Inn, Middletown, New York, a room then registered under the fictitious name of Robert P. Barry of Lynn, Massachusetts.

3. On or about October 20, 1971, JAMES PATRICK FLYNN and RICHARD THOMSON FORD (who was also known as Vincent A. Thomas and John A. August),

the defendants, entered the Orange County Trust Company, Route 211, Middletown, New York, wearing masks and gloves and carrying firearms.

4. On or about October 20, 1971, JAMES PATRICK FLYNN and Richard THOMSON FORD (who was also known as Vincent A. Thomas and John A. August), the defendants, exited from a beige 1972 Plymouth Fury III with tan vinyl top and entered a blue 1971 Plymouth Fury III, in the Middletown Senior High School parking lot.

(Title 18, United States Code, 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 18th day of October, 1971, in the Southern District of New York and elsewhere, JAMES PATRICK FLYNN and RICHARD THOMSON FORD, (who was also known as Vincent A. Thomas and John A. August), the defendants, unlawfully, wilfully and knowingly did transport in interstate commerce from Boston, Massachusetts to Middletown, New York, a motor vehicle to wit, a blue 1971 Plymouth Fury III bearing Massachusetts registration 43965F, knowing this motor vehicle to have been stolen.

(Title 18, United States Code, Sections 2312 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 20th day of October, 1971, in the Southern District of New York, JAMES PATRICK FLYNN and RICHARD THOMSON FORD (who was also known as Vincent A. Thomas and John A. August), the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation, did take from the person and presence of another, money in the approximate amount of $203,938, belonging to, and in the care, custody, control, management and possession of the Orange County Trust Company, Route 211, Middletown, New

York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 20th day of October, 1971, in the Southern District of New York, JAMES PATRICK FLYNN and RICHARD THOMSON FORD (who was also known as Vincent A. Thomas and John A. August), the defendants, unlawfully, wilfully and knowingly did use firearms, to wit, a shotgun and two handguns, to commit a felony for which they may be prosecuted in a court of the United States, namely, the felony set forth in Count Three of this Indictment.

(Title 18, United States Code, Sections 924(c)(1) and 2.)

/s/ Donald J. O. Shea
Foreman

/s/ Paul J. Curran

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 279

UNITED STATES OF AMERICA

—*v*—

RICHARD THOMPSON FORD, DEFENDANT

New York, N.Y.
April 1, 1974
10:30 am
Room 506

Before:

Hon. Charles H. Tenney, District Judge.

APPEARANCES:

Paul J. Curran, Esq., United States Attorney
Jed, Rakoff, Esq.: Assistant U.S. Attorney, of counsel.
(No appearance for defendant)

[2] THE CLERK: Richard Thompson Ford.

MR. RAKOFF: Jed Rakoff for the government, your Honor.

Mr. Ford is here pursuant to a writ. He is presently detained in Massachusetts. He does not appear to have counsel.

THE COURT: Can you afford counsel?

THE DEFENDANT: Well, it seems to me I have been here for 42 hours in Federal custody. In that time I asked the authorities if I could make a phone call to my lawyer to tell them I was in New York, and what charges were brought against me, and they refused me 6 times, 7 times to make a phone call so that is why I

do not have an attorney. At two o'clock Saturday afternoon I was told I was going to New York for the first time.

THE COURT: Do you have anybody representing you in Massachusetts?

THE DEFENDANT: Yes; I have a Mr. Chisholm; he isn't my counsel now but I plan to hire him. If I can't get in touch with him, I know he can.

MR. RAKOFF: Your Honor, if Mr. Chisholm already represents a Mr. Flynn, another suspect in this case, I think there is almost certain to be a conflict [3] of interest.

THE DEFENDANT: Well, your Honor—

THE COURT: I will enter a plea of not guilty.

THE DEFENDANT: Your Honor, could you tell me what the charges are?

MR. RAKOFF: Your Honor, I am now handing over to the defendant a copy of the indictment (handing to defendant).

THE DEFENDANT: If your Honor pleases, if it please the court, may I ask something else? I am going to hire a lawyer from Massachusetts, and I was hoping to be returned to Massachusetts as soon as possible so I will have ample time to prepare my defense, since I am going to hire a lawyer there in Massachusetts.

MR. RAKOFF: Your Honor, I think that is a matter that ought to be addressed to the judge who it is assigned to.

THE COURT: Well, I will enter a not guilty plea to the counts, and he will take up the matter of an attorney for you.

THE DEFENDANT: Your Honor, I am not going to take an attorney from this city and a public defender. [4] I have talked to Mr. Chisholm recently and there is a possibility that I will take him as the attorney—if not, one of his associates. It is my wish.

THE COURT: What is the difficulty in getting ahold of Mr. Chisholm right now?

THE DEFENDANT: Well, they won't let me make a phone call. I haven't been allowed to make a phone call

in 42 hours. They keep giving me excuses—"Well, the social worker isn't here, and this is long distance."

THE COURT: I will direct that you be permitted to make a phone call.

THE DEFENDANT: And also I would like to be able to make a phone call to my wife—she doesn't know where I am.

THE COURT: Certainly; you can call your lawyer.

THE DEFENDANT: Thank you.

THE CLERK: This has been assigned to Judge Bauman.

MR. RAKOFF: Your Honor, there are several other matters. One is, I ask the writ to be adjourned until the question of counsel can be straightened out.

THE COURT: I will adjourn the writ.

[5] MR. RAKOFF: Secondly, your Honor—

THE DEPUTY MARSHAL: How much?

MR. RAKOFF: Ten days, your Honor.

THE DEFENDANT: Your Honor, it is really hard on me sitting here. I live in Massachusetts; my wife is in Massachusetts.

THE COURT: Get in touch with your lawyer, which I am allowing you to be able to do, and if you can be extradited you will have somebody representing you.

THE DEFENDANT: You mean I could be sent back to Massachusetts as soon as possible?

THE COURT: Well, if you have a lawyer represent-you here, yes.

I will adjourn the writ for one week, to April 8th.

MR. RAKOFF: Your Honor, another matter, particularly in view of the desire of Mr. Ford to go back to Massachusetts, we would ask that today, at the time of fingerprinting and photographing, that Mr. Ford also be directed to give hair samples and to give handwriting samples to an agent of the FBI who is present for the purpose of taking such samples.

[6] THE COURT: Before he leaves, when he is represented by a lawyer; if he is going to be here for another week, in the meantime he will get in touch with Mr. Chisholm and communicate with him and he can be present.

THE DEFENDANT: Your Honor, I have one more question—somebody about a co-defendant. Could I have his name so I could tell Mr. Chisholm?

THE COURT: Didn't you get a copy of the indictment?

MR. RAKOFF: He is not a co-defendant. There is another suspect in this case, Mr. Flynn, who has previously been before the grand jury and represented by Mr. Chisholm.

THE DEFENDANT: Well, am I indicted on a charge?

MR. RAKOFF: Yes.

THE DEFENDANT: And there is no co-defendant so far as right now.

MR. RAKOFF: That is correct.

DEPUTY MARSHAL: Your Honor, that is still prints and photographs for now?

THE COURT: Yes, and the hair samples and [7] the handwriting samples later.

(Further proceedings later as follows, in open court);

MR. RAKOFF: Your Honor, I have one other matter concerning Mr. Ford; just a few moments ago I understand from the Marshal that he brought him back because he refuses to cooperate with the fingerprinting department.

THE COURT: What is the problem?

THE COURT: Your Honor, maybe the Marshal would state it.

DEPUTY MARSHAL: We took Mr. Ford downstairs. He refused to give any information to fill out the fingerprint card and he also refused to be fingerprinted.

THE COURT: You have to be fingerprinted. I have delayed any action so far as hair clippings and the writing samples. That is standard procedure. I recognize the fact that you probably have been fingerprinted in Massachusetts, but you are facing charges here also. I suggest that you comply with the standard practice.

THE DEFENDANT: Your Honor, I talked to Mr. [8] Chisholm and he is going to represent me. He advised me not to take fingerprints or photos.

THE COURT: You have already talked to him?

THE DEFENDANT: Yes; he is going to try to visit me tomorrow or Wednesday.

THE COURT: All right.

THE DEFENDANT: And when he is here I will be more than happy to take fingerprints.

THE COURT: All right; can you defer it until he gets down here. If there is any problem when his counsel gets here, notify me and I will talk to counsel.

MR. RAKOFF: Your Honor, just to clarify the matter—

You did talk to Mr. Chisholm?

THE DEFENDANT: Yes.

MR. RAKOFF: And he agreed to represent you?

THE DEFENDANT: Yes.

THE COURT: That being the case, I will defer it until his counsel gets here; okay?

MR. RAKOFF: Very good, your Honor.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 CR. 279

UNITED STATES OF AMERICA

—*vs*—

RICHARD THOMPSON FORD

Before: HON. CHARLES E. TENNEY, United States District Judge

5 April 1974

Appearances:

For the Government: RICHARD HOSKINS, Assistant United States Attorney

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[2] THE CLERK: United States of America versus Richard Thomson Ford.

MR. HOSKINS: Your Honour, now that we are all here and the marshals were planning to bring Mr. Ford up as well, and that's probably—

THE COURT: All right. What is this matter?

MR. HOSKINS: What I am going to do is, there has been a superceding indictment, that is the first thing, and the second thing, I am going to request an adjournment of the writ to April 15th, which is the date on which defendant is expected to plead on the superceding indictment before Judge Bauman.

THE COURT: This has already been assigned out to Judge Bauman?

MR. HOSKINS: Yes, sir.

THE COURT: All right. Well, I will come back down, then.

MR. HOSKINS: All right, Your Honor.

(Recess)

THE CLERK: United States of America versus Richard Thomson Ford.

MR. HOSKINS: Your Honour, this matter is on today after an adjournment on Monday, and I have four applications I would like to make in connection with this case. The first [3] thing is to make sure that the defendant is informed that there has been a superceding indictment filed, the superceding indictment number is 74 CR 336. The previous indictment is 74 CR 279, and I want the record to reflect that I am now giving the defendant a copy of the superceding, the new indictment (handing).

The second matter is that this new indictment has been set down for arraignment before Judge Bauman at 9:30 a.m. on April 15th, which is a week from Monday, and I would like to apply to have the writ with respect to this defendant adjourned to April 15th.

THE COURT: I have the writ here. Is the defendant represented by an attorney yet?

MR. HOSKINS: I am not aware, Your Honour, whether he is or not. I do have—let me just say this—

THE COURT: I thought he said he had gotten in touch with some—

MR. HOSKINS: Mr. Chisholm?

THE COURT: Mr. Chisholm up in Boston, or something.

MR. HOSKINS: Mr. Rakoff, the Assistant in charge of this case, spoke to Mr. Chisholm on Wednesday, and Mr. Chisolm told Mr. Rakoff that at this moment Mr. Chisolm has not decided whether to represent Mr. Ford or Mr. Flynn, the co-defendant in this superceding indictment, so that at this [4] moment he cannot for sure represent Mr. Ford, and in connection with that I want the defendant to know that The Government consents to his making whatever long distance calls he might have to make to Boston to secure counsel, because it is important that he have counsel on April 15th when he pleads to the superceding indictment.

If he wants to call Mr. Chisolm or anybody else in Boston, that is fine with us, because we realize that he has an obligation to get counsel between now and April 15th.

THE DEFENDANT: Your Honour.

THE COURT: Yes?

THE DEFENDANT: Mr. Chisolm was here Wednesday—Tuesday, and I thought he was going to represent me. But he didn't know about Mr. Flynn being indicted. This is the first I know of it. And I wish I could call Mr. Chisolm, you know, and inform him.

THE COURT: All right, you will be given permission to call him.

MR. HOSKINS: The only thing that I would have the defendant understand as well as possible, is that it is important that he have counsel, whether it is Mr. Chisolm or somebody, by April 15th.

THE COURT: Yes.

MR. HOSKINS: The only other application I have, [5] Your Honour, is that at this time once again I apply for the defendant to be fingerprinted and photographed. We brought that up Monday. I believe Your Honour stated that—

THE COURT: Well, if he is going to have counsel, I thought we would delay it. He is going to call. And if nothing is done about this by Monday, about having counsel, well, then I am directing that he be fingerprinted. He has had the opportunity to get counsel, but I will delay it until Monday.

MR. HOSKINS: All right. That is Monday, April 8th?

THE COURT: Yes. Put it on the calendar for Monday.

MR. HOSKINS: All right.

THE COURT: I am not going to keep putting this off.

THE DEFENDANT: Well, Your Honour, if it pleases the Court, as far as being fingerprinted, I am willing to be fingerprinted, but as far as photos, Monday I was—it was fifteen, approximately fifteen or twenty photos taken of me by the U.S. marshals, and F.B.I. Now I

feel that this is a reasonable number of photos taken.

THE COURT: All right, fingerprint him. I don't know about the photographs. If they have taken photographs, let's not harass the fellow by keeping on taking them.

THE DEFENDANT: Now they have another motion in front of the Court, they want to take some more photographs of me. [6] I feel twenty photos is enough to identify me. If they don't know what I look like by now—

THE COURT: Yes, but I don't know what the circumstances are.

THE DEFENDANT: I am willing to be photoed, I am willing to write my signature down, and as far as—like I'll give my description, that's all. I won't give any other information.

THE COURT: Well, all right, we will wait and see on Monday, but in the meantime I suggest that you be fingerprinted if you have got no objection to that, and you are going to be fingerprinted anyway, because I am sure your attorney is not going to be in any position to object to it.

THE DEFENDANT: Yes, I understand.

THE COURT: So let's take care of that, the matter of photographs. If they need further photographs we can take that up on Monday.

MR. HOSKINS: Very well, Your Honour.

THE COURT: But the important thing is for you to get counsel.

THE DEFENDANT: Yes, sir.

THE COURT: Whether it is Mr. Chisolm or whether it is somebody else. Possibly Mr. Chisolm can recommend some- [7] body, too.

THE DEFENDANT: Yes. Well, Monday—

THE COURT: You will be back here on Monday. I am going to adjourn the writ until the 15th as The Government requested, for this superceding indictment. Now, is there any other application The Government has?

MR. HOSKINS: None, Your Honour.

THE COURT: Very well. But he will be produced on Monday. Or do you want me to adjourn the writ until Monday?

MR. HOSKINS: Well, why don't we go ahead and adjourn the writ until the 15th?

THE COURT: All right, but be sure you bring him in Monday.

MR. HOSKINS: Yes, we will.

THE DEFENDANT: You are going to bring me back Monday, the, Your Honour?

THE COURT: You have to be back here Monday to let me know about your counsel. In the meantime you have permission of the Court, with the consent of The Government, to make any phone calls you want to counsel in connection with the retainer of counsel.

THE DEFENDANT: Yes, sir.

THE COURT: And there is no need, I assume—[7a] well, this will be assigned to Judge Bauman, at any rate.

MR. HOSKINS: Yes. As I understand it he has the other indictment, it has been assigned to him.

THE COURT: All right.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 336

UNITED STATES OF AMERICA

against

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a VINCENT A. THOMAS,
a/k/a JOHN A. AUGUST

April 15, 1974
9:50 a.m.

Before: HON. ARNOLD BAUMAN, DJ,

For the Government: Jed S. Rakoff, Esq.

For defendant Ford: Ronald Chisholm, Esq.

[2] case called.

MR. RAKOFF: Your Honor, the Government is here and defendant Ford is here together with his counsel. I do not see defendant Flynn present nor any counsel representing him.

I not for the record that a notice was sent to Mr. Flynn on April 4 and because the time on that notice was not clearly specified, I then sent a personal letter as well to Mr. Flynn.

THE COURT: Could I see the indictment, please. This is Mr. Ford who is before me?

MR. RAKOFF: Yes.

THE COURT: Who is missing?

MR. RAKOFF: Mr. Flynn, the other defendant together with any counsel he may have.

THE COURT: What indictment number?

MR. RAKOFF: 74 Cr. 336, which is a superceding indictment.

THE COURT: Why should I not issue a bench warrant for Mr. Flynn?

MR. RAKOFF: I see no reason and the government would make an application for a bench warrant at this time.

THE COURT: Where is Mr. Flynn, is he on bail?

MR. RAKOFF: Mr. Flynn is in Boston. He has not been arrested. Today was the day for pleading. As I say, [3] a notice was sent and in addition, a personal letter was sent making sure it was 9:30 rather than the usual time of 10:30 done in part I.

THE COURT: Is this another bank robbery case?

MR. RAKOFF: Yes, your Honor, with also a charge relating to interstate transportation of stolen vehicle and use of a firearm.

THE COURT: Bench warrant will issue for Mr. Flynn.

Do I understand that the government sent Mr. Flynn a notice saying he was indicted for bank robbery and inviting him to show up?

MR. RAKOFF: Mr. Flynn had previously been before the grand jury in this case and he was aware of our investigation and he did appear to have roots in the community. We may have been foolish in not arresting him but he had a house in Weymouth and he lived there with his wife and child. It did appear he had roots.

THE COURT: In any event, Mr. Ford is with us today and I gather he has not pleaded as yet?

MR. RAKOFF: Not to this indictment.

THE COURT: Are you counsel for Mr. Ford?

MR. CHISHOLM: Yes. Ronald Chisholm.

THE COURT: Mr. Chisholm, do you want the charge [4] read to Mr. Ford or do you waive the reading?

MR. CHISHOLM: I would waive the reading of the indictment.

THE COURT: How does the defendant plead to this charge, guilty or not guilty?

THE DEFENDANT: I plead not guilty.

MR. RAKOFF: If I may clarify one matter. Mr. Chisholm is from Boston. The government has no objection to his appearing in this case, but under the rules of this Court, a local attorney must file a notice of readiness for the purpose of serving papers and I previously called Mr. Chisholm about a week and a half ago and I informed him of that requirement. I don't know whether he has done anything about that.

MR. CHISHOLM: If the Court wishes, I will endeavor to obtain local counsel.

THE COURT: It is a Court rule. It isn't a matter of my wish. That is the rule.

MR. CHISHOLM: I find no fault with the rule.

THE COURT: Good, I am happy to learn that. The fact is, I will give you a week in which to find some New York counterpart to act as an effective mail drop.

MR. CHISHOLM: May we have ten days for pretrial motions?

[5] THE COURT: Yes.

MR. RAKOFF: Has bail been fixed on the other indictment?

MR. RAKOFF: The other defendant—Mr. Ford is here on a writ. He is presently serving a term of four to eight years so I believe the question of bail is not before us.

Your Honor, there is some question before you. Approximately two weeks ago I filed with your Honor and with Mr. Chisholm and also personal with Mr. Ford, a motion asking that various physical exemplars are taken from Mr. Ford including handwriting samples, hair samples, fingerprint samples and photographs.

My understanding is that the photographs were taken but that Mr. Ford stated that he would not submit to any of the others at least until his counsel is present. His counsel is present today and I would ask that your Honor direct that those exemplars are furnished today to a agent of the FBI who I could arrange to come down here sometime in the morning.

THE COURT: Yes, Mr. Chisholm?

MR. CHISHOLM: If your Honor please, I did receive a copy of the notice of this motion from the government's

[6] attorney but I have not had the opportunity to discuss it with Mr. Ford. He has been presently at I guess the West Street Detention Center and I started to discuss it with him this morning briefly but I have not had sufficient time to discuss it with him.

THE COURT: I will tell you what. I have to charge a jury in another case and listen to summation. Do you think if we waited until 2:15 you would have an adequate opportunity to talk with him?

MR. CHISHOLM: I don't need nearly that much time.

THE COURT: How about 12 o'clock?

MR. CHISHOLM: That would be plenty of time. A half hour.

THE COURT: I can't interrupt my jury trial. 12 o'clock.

Will the marshal have the defendant up here by 12 o'clock.

You might check my courtroom to see whether I am ready to take it.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 336

UNITED STATES OF AMERICA

against

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a VINCENT A. THOMAS,
a/k/a JOHN A. AUGUST

April 15, 1974
2:15 p.m.

Before: HON. ARNOLD BAUMAN, D.J.

For the Government: Jed S. Rakoff, Esq.

For defendant Ford: Ronald Chisholm, Esq.

[2] Case called.

MR. RAKOFF: Your Honor, at this time the Government would renew its motion to have the defendant give hair samples and handwriting and handprinting samples and I understand that the fingerprints that we asked for were taken in a prior case so they won't be necessary to be taken here.

MR. CHISHOLM: If it please your Honor, I have discussed this problem with Mr. Ford and it is Mr. Ford's position that he declines to furnish the exemplars as requested by the government's attorney.

THE COURT: Let's take them one at a time. What are they?

MR. RAKOFF: They are really just two. One is hair samples taken from both sides of the head and from the front.

THE COURT: Let's hold that to one side.

MR. RAKOFF: The other is handwriting and hand printing of the alphabet and the number zero through nine. And a simple short paragraph.

THE COURT: There is no question in my mind that he is required by law to do that and I order you to do that; is that clear?

THE DEFENDANT: Your Honor, I respectfully [3] decline to do it.

THE COURT: All right. I hold you in contempt of Court.

Now, with respect to the hair samples, what is the authority on which the government relies?

MR. RAKOFF: Your Honor, this is no different from any other thing like a fingerprint. We are taking simply a few hairs.

THE COURT: Can you give me any case?

MR. RAKOFF: Yes, your Honor.

THE COURT: That talks about hair samples?

MR. RAKOFF: Your Honor, I believe, and if you will give me a moment I will check, United States v. Fertella does. Well, I see that Fertella refers to blood samples. It is not hair samples, but let me say in this very case, the codefendant James Flynn was ordered to give hair samples by Judge Pollack and he complied with that order.

THE COURT: Blood samples are required, are they not?

MR. RAKOFF: Yes.

THE COURT: I am going to withdraw that finding of contempt. I will give you one week in which to furnish these samples. The law requires you to do that. Is that clear? I will ask you to talk to your lawyer and within [4] one week I will have you back here and I warn you, that if you do not comply with the Court's order, I shall find you in contempt of Court.

The Court orders that you give the handwriting and the hair samples that have been referred to; do you understand that so far?

THE DEFENDANT: Yes, I do.

THE COURT: If you fail to do so within one week, I shall find you in contempt for deliberately flouting the authority of this court; do you understand that?

THE DEFENDANT: Yes.

MR. RAKOFF: I believe the only other matter is, Mr. Ford is here on a writ which was originally adjourned just until today.

THE COURT: I will adjourn the writ for one week. Is there anything else that has to be done?

MR. RAKOFF: Not at this time.

THE COURT: You wanted ten days in which to make motions. I will adjourn the writ ten days. Have your motions returnable in ten days, please.

MR. RAKOFF: There is one other matter, I am sorry I forgot.

With respect to the co-defendant James Flynn, [5] Mr. Flynn was represented by Mr. Chisholm before the grand jury and I am wondering if the Court would inquire of Mr. Chisholm if he knows Mr. Flynn's most recent address as of the last time he contacted him.

THE COURT: Mr. Chisholm?

MR. CHISHOLM: I understand it to be an address in Weymouth, Mass. and I think it is Hibiscus Street or Avenue.

MR. RAKOFF: The last address we have from him is 115 Hibiscus. That is as of three weeks ago. Have you had an opportunity to contact him since that time at that address?

MR. CHISHOLM: If the government attorney is suggesting—

THE COURT: He is asking you, do you know of any newer address than that?

MR. CHISHOLM: No I don't.

MR. RAKOFF: The last thing is, could we inquire as to the last date that Mr. Chisholm contacted with him so we can get an idea?

THE COURT: I am not at all sure he is required to indicate that.

MR. RAKOFF: I see.

THE COURT: I want you to consult with your client, please and tell him what is going to happen if [6] he persists in flouting my order.

MR. CHISHOLM: I will, your Honor.

THE COURT: I shall deal with that as I see fit.

MR. RAKOFF: That is all, your Honor.

THE COURT: Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 CRIM 336(S)

THE UNITED STATES OF AMERICA

—*vs*—

RICHARD THOMSON FORD,
a/k/a VINCENT A. THOMAS,
a/k/a JOHN A. AUGUST

25 April, 1974

Before: HON. ARNOLD BAUMAN, United States District Judge

Appearances:

For the Government: JEB RAKOFF, Assistant United States Attorney

For the Defendant: RONALD J. CHISHOLM, ESQ.

BY: ROBERT FLORSHEIM

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[2] THE CLERK: United States of America versus Richard Thomas Ford. Mr. Rakoff.

MR. RAKOFF: Your Honour, I—

THE COURT: Is he still not here, or what?

MR. RAKOFF: Still not here, Your Honour, and both the clerk and myself have called repeatedly to the marshal.

THE COURT: I understand the truck broke down for the four hundredth time this month.

MR. RAKOFF: Your Honour, there are a few bookkeeping matters we could dispose of in the meantime, if that is all right with Your Honour.

THE COURT: Yes.

MR. RAKOFF: One thing is, Your Honour, this morning I have been handed the notice of appearance of a local counsel pursuant to our general rules by Mr. Chisolm, and the local counsel I note for the record is Mr. Robert Florsheim, 10 Columbus Circle, in New York City.

Also, Your Honour, this morning about half hour ago I was handed three discovery motions by the defense counsel, Mr. Chisolm. The Government consents to large portions of those, and I won't take Your Honour's time with the parts we consent to.

There are a number of items, though, that we oppose and perhaps they could be settled now.

[3] THE COURT: Yes.

MR. RAKOFF: With respect first, Your Honour, to the, what is denominated the motion of defendant Richard Ford for discovery and inspection—

THE COURT: I have that here.

MR. RAKOFF: There are four items there The Government consents to, one and two. With respect to number three, which is to inspect and copy recorded testimony of the defendant Richard Ford and co-defendants before a grand jury, we consent, of course, to Richard Ford.

THE COURT: The remainder is denied.

MR. RAKOFF: Thank you, Your Honour. And as to number four, we consent, but we would ask that we have at least two weeks to produce the documents for inspection and copying. Some of them are not presently in the possession of the U.S. Attorney's office.

THE COURT: All right.

MR. RAKOFF: With respect to the motion of Defendant Richard Ford to discover identification procedures, The Government does not object to showing the photo spreads that were shown to various people.

We do object to revealing the persons to whom the photo spreads were shown, because one of the defend-

ants here is a fugitive armed and dangerous, and we feel there [4] is a danger for that reason.

THE COURT: All right.

MR. RAKOFF: And, finally, with respect to the—

THE COURT: By all right I want the record to indicate that I accept The Government's representation and I agree with The Government's view. Yes?

MR. RAKOFF: With respect to the motion to be furnished with evidence favourable to the accused, there are five specifications of what the defendant apparently regards as Brady material, number two and three, namely statements which would reasonably tend to show that the accused did not commit the offense and evidence which would reasonably show that the defendant did not commit the offense, we do consent to.

The others appear to be an attempt to either elicit the names of The Government's witnesses, or to get thirty-five hundred material in advance of trial, and we would oppose it for those reasons.

THE COURT: Well, I will accept that at this time, but in terms of rap-sheets of any of the prospective witnesses I will direct that a reasonable time before the trial they be furnished to defendant's counsel.

MR. RAKOFF: I will be glad to do that, Your Honour.

THE COURT: Now, you have agreed to two and three.

[5] MR. RAKOFF: Yes, sir, and we oppose—

THE COURT: Four apparently calls for thirty-five hundred material, and they will get that at the appropriate time.

MR. RAKOFF: Right.

THE COURT: As they will with five pursuant to Section 3500. Yes.

MR. RAKOFF: And number one, to the extent that it is not contained in two and three would seem to be just simply 3500—

THE COURT: Well, with respect to one, I said that they will get the rap-sheets reasonably in advance of the trial. "Reasonably" being perhaps a week before the trial.

MR. RAKOFF: Fine, Your Honour. That is all we have now, Your Honour, until the defendant appears.

THE COURT: I will tell you what I am going to do, rather than sit around here waiting for this all morning, I think I am going to set this matter down for twelve noon. What do we have to do with the defendants here?

MR. RAKOFF: Your Honour, the defendant Richard Ford was before you ten days ago and refused to give handwriting, hand printing and hair samples. Your Honour at that point gave him ten days to comply and he has not complied as of today, and so the matter is before you [6] for contempt, or whatever other procedures Your Honour deems appropriate.

THE COURT: Yes. Well, if he does not comply he would then obviously be in civil contempt and could be held during the duration of the proceeding, as I understand the civil contempt law.

MR. RAKOFF: Your Honour, I would respectfully suggest that since he is already serving a four to eight year sentence that that would have no effect.

THE COURT: Not very much, would it?

MR. RAKOFF: And that Your Honour could make a finding that therefore civil contempt is not an appropriate remedy, has in effect been tried for the last ten days without effect, and that a criminal contempt could be entered and a sentence in that case could be made consecutive to the sentence that he is already serving.

THE COURT: I will deal with that problem at the appropriate time. Do you represent this man?

MR. CHISOLM: Yes, Your Honour.

THE COURT: Yes. Well, have him know that if he persists in his contumacious conduct I shall clearly hold him in criminal contempt and the possibility of his being sentenced to six months would be excellent. Just have that in mind when you consult with him.

[7] MR. CHISOLM: Yes, Your Honour. If Your Honour please, may I be heard on one of these motions?

THE COURT: Yes.

MR. CHISOLM: On the defendant's motion for discovery of identification procedures, it is my understand-

ing, if Your Honour please, that one witness was shown various photographs, including the defendant Ford, and selected that photograph as a person that was seen being involved in this in some way.

Now, my request is for the—all persons that were shown photographs and what photographs were shown to them—

THE COURT: Wait, let me stop you right there. Was the same spread shown to anybody to whom the identification from pictures became a question?

MR. RAKOFF: Your Honour, there was a photo spread that was shown to a number of people, all of whom may well be Government witnesses.

THE COURT: And was it the same photo spread?

MR. RAKOFF: Your Honour, the F.B.I. Agent who showed it is here, let me ask him.

THE COURT: Fine.

MR. RAKOFF: Your Honor, I understand that there were two photo spreads, although in fact the pictures [8] appear to have been the same. They are just copies of the same pictures, but we would be glad to make both photo spreads available.

THE COURT: Let me make this clear to you. I am not going to do anything that will identify the prospective identification witnesses to you. What I will do is to cause to be made available to you the spread of pictures so that you can see those pictures so that you can be prepared for whatever kind of identification hearings you want in the light of having seen the spread of the pictures. Is that clear? But I certainly am not going to have you told the names of the people who have made the identification, where one dangerous criminal is walking the streets.

Now, I am not—I have not lost my senses yet and I suggest that I am not about to do that.

MR. CHISOLM: Well, by that does Your Honour mean that referring, I am sure, to the co-defendant, if that person is either apprehended or surrenders or whatever, that The Court's position would change on this motion? Because I think—

THE COURT: What it means is that when, as and if he is apprehended I will consider the question anew. But at the moment I will deny any application that might tend to identify identifying witnesses.

[9] MR. CHISOLM: Well, may I be heard additionally on this motion, Your Honour? Perhaps I might—if The Government has identifying witnesses I am reasonably certain that they would be produced at the trial, and what I am more concerned with is that where potential identifying witnesses that were in the area that were shown photographs that included the defendant Ford, that did not identify him, and I point out that that could be or is in the nature of exculpatory evidence, and conceivably other witnesses were in a better position to make an identification than those that did make an identification.

THE COURT: Let's first find out if there are any in that category.

MR. RAKOFF: Your Honour, there is no one to my knowledge who said, "I saw the man who did it and this, or, no one in this spread is that man." There may be, I am just not certain in my own recollection, there may one or two persons who simply were not able to make an identification, period.

THE COURT: Well, I have always taken the position that witnesses fall into three categories in a picture spread of this kind: One, those that can select the person and make the identification; the other, people [10] who can look at a spread and say, "No, the man who did it is not there"; and the third being those who look at a bunch of pictures and say, "I can't say whether the picture of the man is there or not."

Now, with respect to the third category I don't think that because a person can't pick out a picture from a group of pictures that really tells you very much about whether the defendant was there and did it or not. All it means is that shown a spread of pictures he can't make the identification.

It does not prove that face to face with the defendant he could not identify him. Or even if he could not identify him that would still not be the same category

as a person who says, "No, he was not there." Now, such a person who said that none of the people in the pictures was among the people who are charged with this crime, I would make available but Mr. Rakoff says that there are none.

MR. RAKOFF: None, Your Honour.

THE COURT: There may be one or two who will say, "Listen, I can't tell you whether his picture is here or not, I just don't know." And those I really don't feel tend to prove that your man didn't do it.

MR. CHISOLM: Well, if I may, Your Honour, I agree [11] with Your Honour, there is certainly I agree with Your Honour's analysis of three categories of identifying witnesses, but referring to the so-called third group, the ones that after being shown photographs would say that, "I can't say whether he is the person in question," those are the ones that I am, I should say, primarily concerned with at this point, because those are the ones that could in answer to The Court's position and The Government's position on a co-defendant being at large and disclosing the name of an identifying witness, of course that argument would not apply to this third classification.

THE COURT: Well, I agree with that.

MR. CHISOLM: And I say on these, Your Honour—

THE COURT: I'll tell you what. What authority, what case would you call to my attention as authority for the proposition that you're putting forward?

MR. CHISOLM: Well, I would say I don't have a case, Your Honor. I would say the due process clause of the Federal Constitution of fairness—

THE COURT: Well, I have heard of that clause, but I wonder if there is any case that you—

MR. CHISOLM: I don't know of any, Your Honour.

THE COURT: All right.

[12] MR. CHISOLM: I just think in fairness in due process, Your Honour, I would say that conceivably these persons were in a better position to make an observation and if they did not that might be evidence conceivably or undoubtedly is evidence favourable to the accused of an exculpatory nature, I would say.

THE COURT: I don't regard it as such. At any event you have made your argument in the record and should your person be convicted it is available to you.

MR. CHISOLM: Your Honour, may I just say in—

THE COURT: I don't want to hear any more about due process, because I think I have got my full dose of that for today.

MR. CHISOLM: Your Honour, on the question of the motion—

THE COURT: If you want to come back tomorrow, though, and talk about it for a half hour, I will be happy to listen.

MR. CHISOLM: With respect to these motions, The Government has agreed to furnish, I would ask, Your Honour, that The Court examine The Government's file to see whether there is any exculpatory—evidence of exculpatory nature which should be furnished to the defendant, because conceivably The Court would take a [13] different position than The Government prosecutor.

THE COURT: Let me see if I understand you. You want me to sit down with The Government's file here and go through each paper in The Government's file and pick out those that I think might tend to help your client; is that it?

MR. CHISOLM: That is of an exculpatory nature, yes, Your Honour.

THE COURT: And I take it that if you ask for it in this case then you would assume that that is my duty in every single criminal case, would you not? That if a defendant's lawyer asked me to sit down with The Government's file that it is my duty to go through those sheets one by one and look for exculpatory evidence; is that correct?

MR. CHISOLM: In those—

THE COURT: Well, I want to tell you something: that will be the day. Denied. Oh, here they are, and here he is, now.

MR. RAKOFF: Here he is, Your Honour.

(Defendant enters the Courtroom)

MR. CHISOLM: May I have an opportunity to discuss the issue with him, Your Honour? I have seen him after the last Court appearance a week ago, and—

[14] THE COURT: Yes. Do you want me to step down from the bench so you will have a reasonable time to talk with him?

MR. CHISOLM: I think five minutes will be enough, Your Honour.

THE COURT: All right. Let me know when you are ready.

(Recess)

MR. CHISOLM: If Your Honour please, I have discussed the, I guess it's the pending Government's motion, with Mr. Ford, and it is my understanding as far as—well, I think he has furnished photographs anyway at some prior date, and again he has no objection to those, but I think he has furnished a great number, and as far as the fingerprints and the full prints, I understand he will furnish those and as far as the handwriting specimens, or exemplars, I understand he will furnish those, and as far as the hair exemplars I understand he will not furnish that. That is his position.

MR. RAKOFF: Your Honour, The Government would move that the defendant be held in contempt.

THE COURT: What case do you rely on with respect to the hair exemplars?

MR. RAKOFF: Your Honour, the leading case, perhaps, [15] is the Smerber case before The Supreme Court which held—

THE COURT: Is that the one on voice exemplars?

MR. RAKOFF: No, that is the one on blood samples.

THE COURT: Oh, yes, of course.

MR. RAKOFF: And it would seem that if you can take blood samples that hair samples are much more minimal—

THE COURT: I don't think there is any question about that.

MR. RAKOFF: And, therefore, Your Honour, The Government would request that the defendant having been now given numerous opportunities to comply, and

having refused to comply, be held in Your Honour in contempt.

THE COURT: Mr. Ford, I order you to furnish a hair sample to The United States Government; do you understand that?

THE DEFENDANT: Your Honor, I decline. Respectfully decline.

THE COURT: I find you in criminal contempt of Court and I shall invoke sentence—well, I think I will follow what The Supreme Court said. At present I shall hold you in civil contempt of Court, and at the appropriate time if you persist in this I will hold you in criminal contempt of Court and I will impose a sentence upon you that will succeed the sentence which you are now serving and any [16] other sentence that may result from this case; do you understand that?

THE DEFENDANT: Yes, Your Honour.

THE COURT: All right. Now, when do you want to try this case, Mr. Chisolm?

MR. CHISOLM: Well, The Government, I think, has requested two weeks on certain discovery, and less on—

THE COURT: Let me see what Mr. Rakoff's schedule is.

MR. RAKOFF: Your Honour, there are only two matters that would prevent The Government from going to trial immediately.

THE COURT: It is a bank robbery case, isn't it?

MR. RAKOFF: Yes. The immediate problem is, Your Honour, that Mr. Flynn, the co-defendant, is a fugitive and we feel that we have a reasonably good chance of finding Mr. Flynn and thus saving The Court time by going forward with the trial of both defendants at once. We would request that we be given at least a few weeks to try to find Mr. Flynn.

THE COURT: Well, that is all right. Normally I would press you a little harder, but because he is in prison, not due to a failure of bail but because he is serving another sentence, it doesn't occur to me that the same pressure exists in this as otherwise. However, I [17] will ask counsel when he would like to try the case.

MR. CHISOLM: Well, I would like to try it the middle of May, Your Honour, and not before. I think The Government needs a couple of weeks to furnish some discovery to me.

THE COURT: All right. Is that agreeable?

MR. RAKOFF: Well, Your Honour—

THE COURT: I mean, it is a bank robbery case.

MR. RAKOFF: Yes.

THE COURT: It is a one-bank bank robbery as opposed to some of the others which I have had which are seven, eight, nine and ten count bank robberies of different banks. So if I have to try the thing twice I would guess in light of my experience the trial in this case probably won't take more than three or four days at the outside.

MR. RAKOFF: That is correct, Your Honour.

THE COURT: So if I have to try it twice when they pick up the other fellow, I will.

MR. RAKOFF: Your Honour, the only other thing, it is a purely personal matter and I hesitate to mention it because of course the case can always be reassigned if necessary, I am handling the Tramonte appeal, as Your Honour may know, and the brief is scheduled to be filed [18] in that on the third week of May, and I would only ask that therefore the trial be slightly after that.

THE COURT: Well, how about—the 27th of May is Memorial Day, at least the holiday that we celebrate for Memorial Day on the Monday—how about the 28th, Mr. Chisolm?

MR. CHISOLM: That is agreeable with me, Your Honour.

THE COURT: Mr. Rakoff?

MR. RAKOFF: That's fine, Your Honour.

THE COURT: All right. The case will be tried on May 28th.

MR. RAKOFF: Your Honour, the only other business then is I gather from what Mr. Chisolm says that the defendant is willing now to give the handwriting and handprinting, and we would ask that he furnish that now to the F.B.I. Agents.

THE COURT: Yes, he has agreed to do that, and he will do it, now.

MR. RAKOFF: Thank you, Your Honour.

THE COURT: Is there anything else?

MR. RAKOFF: No, Your Honour.

THE COURT: All right. What sentence is this defendant serving now, Mr. Chisolm? It is obviously a State Court sentence.

[18a] MR. CHISOLM: Yes, Your Honour, I understand it is an eight to ten year sentence.

THE COURT: Eight to ten?

MR. CHISOLM: Yes, Your Honor, in The Commonwealth of Massachusetts State Prison.

THE COURT: All right, thank you.

MR. CHISOLM: Thank you, Your Honour.

MR. RAKOFF: Thank you, Your Honour.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 (AB)

[Filed May 17, 1974]

UNITED STATES OF AMERICA

—*v*—

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas",
a/k/a "John A. August", DEFENDANTS

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that, at a time and place convenient to the Court, the Government will move this Court for an order adjourning the trial of the above-entitled case presently scheduled for May 28, 1974, for a period of approximately 90 days or until the apprehension of the fugitive co-defendant Flynn, whichever period is shorter.

This motion is based on this notice, the annexed affidavit of Assistant United States Attorney Jed S. Rakoff for the Government, and all the papers and proceedings heretofore in this case.

Dated: New York, New York
May 16, 1974.

Yours, etc.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States of America

By: /s/ Jed S. Rakoff
JED S. RAKOFF
Assistant United States Attorney

To: RONALD J. CHISHOLM, ESQ.
Three Center Plaza
Boston, Massachusetts 02108
(Attorney for defendant Ford)

ROBERT FLORSHEIM, ESQ.
10 Columbus Circle
New York, New York 10019
(Local attorney of record for defendant Ford)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S.74 Cr. 336(AB)

UNITED STATES OF AMERICA

—*v*—

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas,"
a/k/a "John A. August," DEFENDANTS

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

JED S. RAKOFF, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and have responsibility for the prosecution of the above-captioned case. I make this affidavit in support of the Government's motion for an adjournment of the trial of this case, presently scheduled (as to defendant Ford) for May 28, 1974, for a period of approximately 90 days or until the apprehension of the fugitive co-defendant Flynn, whichever period is shorter.

2. The Government respectfully submits that such an adjournment would fully comport with this District's Plan for Achieving Prompt Disposition of Criminal Cases (the "Speedy Trial Rules"), would be in the best interests of justice and judicial management, and would not prejudice defendant Ford in any material respect.

I. LESS THAN TWO MONTHS OF THE SPEEDY TRIAL RULES' 'SIX MONTH PERIOD' HAS RUN.

3. Ford escaped from a Massachusetts prison sometime prior to 1970 (I believe, 1968). A Massachusetts warrant charging him with escape and assault with intent to murder issued as a result. The Government expects to prove that in 1971, while living in Greenwood Lake, New York, under the alias "Vincent A. Thomas," he joined with co-defendant Flynn and others to commit the armed bank robbery and ancillary crimes charged in the instant indictment. At any rate, a federal warrant based on a complaint charging Ford with the bank robbery was issued in 1971. Ford, however, remained a fugitive until October 11, 1973, when he was captured in Chicago under the name "John A. August."

4. Upon his capture, Ford was turned over to Massachusetts authorities to stand trial on the prior state charges, and the federal warrant was lodged as a detainer. (About this same time, Ford wrote a letter to the Southern District of New York requesting a Speedy Trial on the federal charges.) On February 8, 1974, midway through his trial in Massachusetts, Ford changed his plea to one of guilty on charges of escape, assault with intent to murder, and related charges. He was sentenced forthwith to concurrent terms of 8 to 10 years imprisonment, which term he is presently serving. The judgments were entered that same date, February 8, 1974.

5. Hence, February 8, 1974, is, at earliest, the date on which the "six-month period" under the Speedy Trial Rules began to run as to Ford.* This is because the period prior to October 11, 1973, during which time he was a fugitive, is a period excluded from the six-month computation by virtue of Rule 5(d) of the Speedy Trial Rules, which treats as an excluded period "The period of delay resulting from the absence or unavailability of

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* The shorter, "three-month period" for detained defendants does not apply to "any defendant who is serving a term of imprisonment for another offense . . . ." Rule 3 of the Speedy Trial Rules.

the defendant." Similarly, the period from October 11, 1973, until the disposition of the Massachusetts charges on February 8, 1974, is an excluded period by virtue of any of three separate provisions: Rule 5(d), *supra*; Rule 5(f), which excludes "The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial;" ** and, particularly, Rule 5(a), which excludes "The period of delay while proceedings concerning the defendant are pending, including but not limited to . . . trial of other charges, and the period during which such matters are *sub judice*." See, *e.g.*, *United States* v. *Cangiano*, 491 F.2d 906, 909 (2d Cir. 1974).

6. On March 21, 1974, a two-count Indictment (74 Cr. 279), charging Ford with the 1971 armed bank robbery, was filed in this District Court. Ford was arraigned before Judge Tenney on April 1st at which time he refused to be fingerprinted. The case was assigned to Judge Bauman for all purposes. Also on April 1st, the Government filed a notice of readiness as to defendant Ford.

7. On April 3, 1974, the Grand Jury voted a superseding indictment, charging Ford, Flynn and others unnamed, with the bank robbery, conspiracy, and related crimes. Flynn, who had appeared before the Grand Jury in March (at which time he was represented by Ford's present attorney, Ronald Chisholm), appears to have become a fugitive immediately thereafter. As of now, he still has not been apprehended. Accordingly, none of the "six-month period" has run as to Flynn. Rule 5(d), *supra*.

8. On April 15, 1974, Ford, now represented by Mr. Chisholm, entered a not guilty plea to the present indictment. Ford was given 10 days for motions. A hearing was also held on the Government's motion (first made on April 1st) for physical exemplars; when Ford refused

** The "reasonable efforts" provision, in a context such as this, appears to be satisfied by filing a detainer, as was done here. See Rule 9(b)(ii), Speedy Trial Rules.

to provide handwriting, handprinting, and hair samples, he was given one week to comply with this Court's order to furnish the same or else face contempt.

9. On April 25, 1974, following Ford's continued noncompliance with respect to the furnishing of hair samples, Ford was held in civil contempt by this Court and warned of the further possibility of criminal contempt. Also, on April 25th, this Court ruled on defendant's pre-trial motions, made that same day. But as of now, he still has not complied with this Court's order.

10. It follows that some or all of the period from April 1st to the present must be excluded from the computation of the six months period that began to run on February 8, 1974, for at least two reasons:

11. First, under Rule 5(a), there must be excluded "The period of delay while proceedings concerning the defendant are pending, including but not limited to . . . pre-trial motions . . . trial of other charges . . . and the period during which such matters are *sub judice*." The Government's pre-trial motion that defendant furnish various physical exemplars, including fingerprints, handwriting, handprinting, and hair samples, was first made orally before Judge Tenney on April 1st and then, when the case was assigned to Judge Bauman, made in writing in motion papers filed April 2, 1974. This motion, and the attendant contempt proceedings, were not completed (if, indeed, they can be said to be completed as of now, since criminal contempt proceedings against Ford are still pending unless he purges himself of his civil contempt) until April 25, 1974, when this Court found Ford in civil contempt. Thus, the period from April 1st through April 25th should be excluded from computation of the six-month period.

12. Second, Rule 5(c)(i) excludes from the six-month period of time during which "evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period." Clearly, the Government has exercised due diligence in an attempt to obtain evidence of defendant's

hair samples—evidence that may prove highly material if it becomes available and if a scientific comparison shows it to be similar to hairs recovered by the Government from the scenes of crimes charged in the instant indictment. There would appear to be some reasonable grounds, moreover, for believing that the defendant Ford will eventually make this evidence available, since he for some time also refused, but eventually complied, with Court orders to supply fingerprints (admittely not nearly so vital in this case, since the bank robbers wore gloves) and handwriting and handprinting (also, admittedly, of less value on the facts of this case). Presumably, it was the hope of this Court that defendant would eventually also provide the hair samples that prompted the Court to find defendant only in civil contempt, despite his repeated and wilfull refusals to furnish the hair samples, and to thus provide him with the opportunity of purging his contempt. Alternatively, even if there is no longer any reasonable expectation that defendant will supply the hair samples (or, what is the same thing, supply them in time that a pre-trial scientific comparison can be made), surely defendant is estopped from invoking the benefits of the Speedy Trial Rule when he himself is the sole cause of the unavailability of potentially crucial evidence without which the Government will be forced, through no fault of its own, to go to trial less materially prepared than it ought to be. In short, it is submitted, that pursuant to Rule 5(c)(i), there should be excluded from the six month period the entire time from April 1st through the present (and continuing), in which defendant has refused to make material evidence available —at least until such time as the Court concludes that there is no reasonable ground for supposing that such evidence will become available within a reasonable period.

13. If the entire period from April 1st through the present is excluded from the six-months computation, only 51 days of the 180 days grace-period permitted by the Speedy Trial Rules has actually run, *i.e.*, February 9, 1974, through March 31, 1974. Even if only the period from April 1st to April 25th is excluded, still,

as of May 28th (when trial is scheduled), only 83 days of the 180 days will have run, so that a 90-day adjournment would still be very much in keeping with both the letter and the spirit of the Speedy Trial Rules. (The letter binds the Government as to being ready for trial, but does not bind the Court in actually setting a trial date, *United States* v. *Cacciatore*, 487 F.2d 240, 243, n. 2 (2d Cir. 1973)—though, of course, it provides a kind of guideline against which the Court can judge the reasonable bounds of its discretion.)

II. THE INTERESTS OF JUSTICE AND SOUND JUDICIAL MANAGEMENT SUPPORT THE REQUESTED ADJOURNMENT, AND DEFENDANT IS NOT PREJUDICED BY IT.

14. The underlying fact which forces the Government to request this adjournment is that the co-defendant Flynn took flight (somewhat to the Government's surprise) at the time of his indictment and, in the few weeks that have since elapsed, has not been apprehended. While, of course, there is no guarantee that Flynn can be apprehended within any given period of adjournment, the Government respectfully submits that, given the very little time that (on any reckoning) has thus far elapsed since this case came on before the Court, the Government is entitled to a reasonable further delay in order to try to apprehend him.

15. The reasons why the fugitive status of Flynn warrants an adjournment with respect to the incarcerated co-defendant Ford are two, each of which, incidentally, constitutes grounds of delay under the Speedy Trial Rules, although even if they did not, the 90-day maximum placed on the Government's request would mean that the six-month period would not be exceeded in any event.

16. First, the need to try the case twice would put an unwarranted strain on the time and resources of the Government and this Court. This case involves no ordinary bank robbery, but rather a far-flung conspiracy which was calculated to conceal the identities of the robbers and which entailed, merely by way of preparation

for the robbery, the commission of substantive crimes in at least three States. (The robbery itself netted over $200,000.) At present the Government, even if it puts on a "thin" case, anticipates that it will have to call a minimum of 27 witnesses from all over the country. The Government submits that sound management warrants avoidance of having not one but two trials of this length, when there is a realistic possibility that the fugitive Flynn can be apprehended and there is no compelling reason to move forward as to the non-fugitive Ford.

17. Second, of course, the Court is already aware from the Government's representation at the April 25 hearing that the fugitive Flynn is a former felon (having at least three prior convictions for such crimes as armed robbery) considered by the FBI to be armed and dangerous and thus, inherently, a potential danger to Government witnesses. Specifically, this danger was brought to the attention of this Court on April 25 in the context of defendant's motion for the names of all the Government witnesses to whom photospreads were shown. The Government opposed this motion, stating:

> "We do object to revealing the persons to whom the photo spreads were shown, because one of the defendants here is a fugitive armed and dangerous, and we feel there is a danger for that reason." (April 25 Hearing Transcript, pp. 3-4)

In ruling in the Government's favor on this point, this Court stated to defense counsel (who, as noted, was previously counsel for the fugitive as well):

> "Let me make this clear to you. I am not going to do anything that will identify the prospective identification witnesses to you. What I will do is to cause to be made available to you the spread of pictures so that you can see those pictures so that you can be prepared for whatever kind of identification hearings you want in light of having seen the spread of the pictures. Is that clear? But I certainly am not going to have you told the names of the people who have made the identification, where

> one dangerous criminal is walking the streets. Now, I am not—I have not lost my senses yet and I suggest that I am not about to do that." (April 25 Hearing Transcript, p. 8)

The Government submits that these same strong considerations that prompted this Court to deny identification of the Government witnesses to defense counsel prior to the Ford trial, so long as Flynn was a fugitive, just as strongly warrant adjournment of the trial altogether while Flynn remains a fugitive and while there is no compelling reason against a few months' adjournment for the purpose of trying to apprehend the fugitive.

18. Each of the above considerations finds support in particular provisions of the Speedy Trial Rules (although it must be remembered that a 90-day adjournment, even if not "excluded" from the six-month rule computation, would not extend Ford's trial beyond the six-month period). To begin with, the general provision of Rule 5(h) providing for a "period of delay occasioned by exceptional circumstances" has been applied by our Court of Appeals to sanction delay in situations generally analogous to the present one. For example, in *United States* v. *Rollins*, 487 F. 2d (2d Cir. 1973), the Government, without even notifying the Court, failed to bring the case to trial within six months, partly from inexcusable inadvertance but partly because the Government's secret witness was himself under suspicion in another investigation that might be compromised if he took the stand and revealed his cooperation with the Government. The Court of Appeals, applying Rule 5(h), refused to dismiss the indictment, stating "the public interest in prompt adjudication must be balanced against competing interests." (487 F. 2d at 414). Similarly, in *United States* v. *Cuomo*, 479 F. 2d 688 (2d Cir. 1973), *cert. denied* —— U.S. —— (1974), a ninety-day adjournment to protect the safety and usefulness of an informant was held to be an "excluded period" in terms of the Speedy Trial Rules.

19. A more specific provision of the Speedy Trial Rules that is also very much in point is Rule 5(e), providing for "A reasonable period of delay when the de-

fendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance." * Applying this provision very recently in *United States* v. *Cangliano*, 491 F. 2d 906, 909, our Court of Appeals found "good cause" for not granting a severance in the mere fact that the defendant there had not specifically moved for a severance and did not, in any case, make any showing of prejudice suffered from the delay resulting from the lack of severance. Here, likewise, defendant Ford has neither specifically moved for a severance ** nor made any showing of prejudice from delay (as set forth below, there is no prejudice). But, additionally, in the present case there are the positive reasons to avoid severance, already set forth above, if possible, until Flynn is apprehended.

20. Finally, defendant Ford will not in any way be prejudiced by the proposed 90-day adjournment. Ford himself is just beginning the serving of several 8-10 year concurrent sentences imposed last February; his personal freedom will thus, not be in any way curtailed by the adjournment. As to the preparation of his defense, the adjournment can only aid it. In response to the defense's three extensive discovery motions (as limited by this Court's rulings on April 25), the Government has already supplied the defense with voluminous discovery, including everything this Court ordered made available to defense, except for a few telephone records and FBI laboratory reports that are presently on their

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* Rule 5(e) continues: "In all other cases the defendant should be granted a severance *so that he may be tried within the time limits applicable to his case.*" (emphasis supplied). As the Court of Appeals made clear in *Cangliano, infra*, this provision does not come into force with respect to a delay that would not exceed the six-month period as to either the defendant or the co-defendants. In the present case, as noted, a 90-day delay will not push the trial beyond the six month period as to either Ford or Flynn.

** While, at the hearing on April 25, this Court, sua sponte, indicated that it might proceed to trial against Ford alone if Flynn were not apprehended by May 28—(hence the need for this present motion)—any actual severance ruling would have been premature on April 25 and none was made. At no time has defendant Ford moved for severance.

way to my office and will be turned over for inspection and copying just as soon as they arrive. Also, defense counsel Chisholm complained to me just yesterday (5/14) that the fact that defendant Ford was being held here in the Federal House of Detention while he (Chisholm) had his office in Boston, had made the defense's pre-trial preparation more difficult. However, if the adjournment is granted, Ford will undoubtedly be sent back to the Walpole, Massachusetts prison where he is serving his present sentence, and thus will be more easily available to Mr. Chisholm for pre-trial consultations.

WHEREFORE, the Government respectfully requests that this Court adjourn the trial of the instant case for approximately 90 days from the presently scheduled trial date (May 28, 1974) or until the apprehension of the fugitive co-defendant Flynn, whichever period is less.

/s/ Jed S. Rakoff
Assistant United States Attorney

Sworn to before me this 16th day of May, 1974.

/s/ Gloria Calabrese
GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336(AB)

[Filed May 22, 1974]

UNITED STATES OF AMERICA

—*v*—

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas,"
a/k/a "John A. August," DEFENDANTS

NOTICE OF MOTION & AFFIDAVIT

PAUL J. CURRAN
United States Attorney
Attorney for USA
Tel. 264-6420

5/22/74—Motion granted. Trial date Aug. 21, 1974.

BY ORDER OF

/s/ Arnold Bauman
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 336

UNITED STATES OF AMERICA

vs.

RICHARD THOMSON FORD
a/k/a "Vincent A. Thomas"
a/k/a "John A. August," DEFENDANT

Before: HONORABLE ARNOLD BAUMAN, District Judge.

United States Court House,
New York, New York,
May 22, 1974

Appearances:

PAUL J. CURRAN, Esq., United States Attorney,
For the Government,

JED S. RAKOFF, Esq., Assistant U.S. Attorney,
of Counsel.

RONALD CHISHOLM, Esq.,
For the Defendant.

[2] THE COURT: I will hear you, Mr. Rakoff.

MR. RAKOFF: Your Honor, the Government submitted last week to defense attorney Chisholm and to your Honor a motion for an adjournment either until the defendant Fugitive Flynn is apprehended or for ninety days, whichever is shorter; and your Honor, the basis of our motion is, on the one hand, the Government is prejudiced by the absence of this defendant, both in having to try what will be a substantial trial in terms

of length twice, and also because of the fact that he is an armed and dangerous fugitive.

On the other hand, the defendant in custody, Mr. Ford, is not prejudiced by any adjournment.

THE COURT: He is serving another sentence, isn't he?

MR. RAKOFF: He is serving another sentence, that's correct, your Honor. The six-month rule has just barely begun to run. Even the ninety days would not put us beyond the six-month period.

Finally, your Honor, the defendant Ford to some extent has prejudiced the Government in going forward now by his contemptuous refusal to provide what could be very material evidence in the form of hair samples. [3] For all these reasons, your Honor, we would ask for an adjournment as indicated.

THE COURT: Yes, sir?

MR. CHISHOLM: If it please your Honor, first I would suggest that in October of 1973 the defendant Ford was apprehended in Illinois and taken into custody, and while in custody in Illinois, he wrote to the United States Attorney for the Southern District of New York and also to the Chief Justice for the Southern District of New York letters containing identical contents in essence, demanding a speedy trial.

Mr. Rakoff does have that letter, and I have a copy before me.

THE COURT: I think the record should indicate that within the last week or ten days the United States Attorney, Mr. Rakoff, asked leave to present an affidavit and then asked that I seal it, and I have done it, and it is made part of the record in this case, and it is sealed, and it is not available to you.

Accordingly, I regard you now as renewing your motion for a speedy trial, and I am going to grant the Government the adjournment it requests, ninety days.

Your position is noted on the record. You may expand on it if you want.

[4] MR. CHISHOLM: May I, your Honor? I had not completed my position.

THE COURT: Yes, you may.

MR. CHISHOLM: In addition to that, I suggest that on, I believe it was, April 25th of this year, the Government made essentially the same argument for a delay in the trial date without requesting any specific period of time.

THE COURT: I really think that where there are two defendants and one of them is a fugitive, that is the kind of circumstance that would require me to adjourn the case at least for a reasonable period of time so as to permit the Government to attempt to apprehend the fugitive, so that the case can be tried as to both at the same time, thereby saving judicial time, manpower, and money.

MR. CHISHOLM: Additionally, if your Honor please, I suggest to the Court the Government did receive in October from Mr. Ford a letter requesting or demanding a speedy trial, and it is indicated in the Government's motion and affidavit that he was indicted on March 21st of this year although he was not notified of that until, I believe it was, April 1st of this year.

THE COURT: The Government is still safely within [5] the six-month period, isn't it?

MR. CHISHOLM: I don't want to concede that, your Honor. I point out in the Government's argument here, Mr. Ford endeavored to have this case tried before his cases were pending in Massachusetts, although he was taken back to Massachusetts, and at that time he was proceeded against in Massachusetts.

THE COURT: That kind of option was not available to people charged with bank robbery, or what was he convicted of?

MR. RAKOFF: Escape and assault with intent to murder.

THE COURT: Escape and assault with intent to murder in Massachusetts and bank robbery here. You see, he doesn't have that option.

MR. CHISHOLM: I suggest, your Honor, he endeavored—I am pointing out to the Court he endeavored to have this case tried—

THE COURT: You may make your record.

MR. CHISHOLM: With due diligence, and the suggestion by—I think the suggestion by the Government is that because the trial in Massachusetts was in February, that it did not need to proceed against him.

Of course, the Government in this case could have [6] proceeded prior to the time that Massachusetts proceeded against him, and hypothetically, Massachusetts may not have proceeded for a year or two years, hypothetically. Would it then be the Government's position that it did not have to proceed on this case until after Massachusetts?

The Government points out that there is no prejudice to the defendant Ford, and I suggest, your Honor, there is prejudice. In Massachusetts, while serving a sentence in Massachusetts he would be eligible for a work release program, while he is not eligible with this detainer lodged against him.

THE COURT: What is his previous record, if any, before the assault with intent to murder?

MR. RAKOFF: Your Honor, I don't have the rap sheet right here, but I do at least recall that he has a conviction for armed robbery and a conviction, I believe—well, a second felony conviction. I just don't remember the exact terms of it.

THE COURT: This is the kind of fellow they are putting on work release programs in Massachusetts?

MR. CHISHOLM: I suggest—I don't want to state the policy and programs in the Commonwealth of Massachusetts. I know there is a great deal of criticism daily in the papers of them, but I don't want [7] to take sides or issues with either side on it. I just am talking about the prejudice to the defendant.

And also, in Massachusetts, your Honor, a person serving a sentence is eligible for furloughs, that is, weekend furloughs. He can go home with his wife for a weekend. They release him from the institution to come back, and this is applied to persons serving life sentences for first-degree murder, sentences under which they are not eligible for parole during their natural life, and they still are coming within this furlough program, that they are released to go home for a weekend to visit their family or wife or friends or relatives, or a long weekend if it's

a holiday, perhaps; and this is a program that is in Massachussetts; and it's, I suggest, an answer to the—this program exists—in answer to your Honor's inquiry of the defendant's background with prior convictions, that even persons with much greater or more serious records of convictions than Mr. Ford's are released on this furlough for weekends or few days or short periods of time.

Mr. Ford is eligible for that, but because of this detainer in this matter, he is being denied that, and that is certainly a prejudice to him. This is in answer to the Government's suggestion that there is no [8] prejudice to the defendant.

THE COURT: When the Government talks about prejudice, it talks about prejudice in preparation of defense of this charge. That is what they are talking about.

MR. CHISHOLM: Well, the defendant, I assume, your Honor, is entitled to a speedy trial, and that is what he is—

THE COURT: The Constitution says so.

MR. CHISHOLM: That is what is requested.

THE COURT: I think I have heard enough. I am going to set this trial down for ninety days from today.

MR. CHISHOLM: That is over the defendant's objection, if your Honor please.

THE COURT: Yes, of course.

How about August 21st?

MR. RAKOFF: That would be fine, your Honor.

THE COURT: August 21st for trial over the defendant's objection.

JSR:bg

June 3, 1974

Ronald J. Chisholm, Esq.
Three Center Plaza
Boston, Massachusetts 02108

Re: United States v. Richard Thomson Ford, et. al., 74 Cr. 336(AB)

Dear Mr. Chisholm:

At our meeting of May 14, 1974, at which time I made available to you extensive discovery in this case, I mentioned that there was one item to which you were entitled which I did not yet have in my possession: the results of the comparisons done between the handwriting and handprinting of defendant Ford (your client) and a certain Holiday Inn registration (already shown to you) obtained by the Government in its investigation of this case. I have now received the FBI report relating to this comparison, as well as to comparisons made with respect to exemplars from another person involved (as you know) in this investigation, James Michael Murphy. A copy of the report is here enclosed.

This, I believe, completes the pre-trial disclosure in this case, but I will, of course, review my files shortly prior to trial (presently calendared for August 21), and, if there is any discovery which I have overlooked or which is received after today, I will make it available to you reasonably before trial.

I have conveyed to the United States Marshal here your request that defendant Ford be sent back to Walpole prison so that you can meet with him more conveniently in preparation for trial, and I have informed the Marshal that the Government consents to your request.

Yours truly,

PAUL J. CURRAN
United States Attorney

By: _____
JED S. RAKOFF
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 336

UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

RICHARD THOMSON FORD, DEFENDANT

Before: HON. CONSTANCE BAKER MOTLEY, District Judge.

New York, N.Y.

October 16, 1974—4:15 p.m.

Appearances:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York;

By: STEVEN A. SCHATTEN,
Assistant U.S. Attorney

—and—

CARL BORNSTEIN,
Assistant U.S. Attorney (Strike Force)

RONALD CHISHOLM, ESQ.,
Attorney for Defendant.

[2] MR. SCHATTEN: Ready for the Government, your Honor.

MR. CHISHOLM: Ready for the defendant, your Honor.

THE COURT: Mr. Chisholm, do you represent both of these defendants, Ford and Flynn?

MR. CHISHOLM: No, your Honor. I just represent the defendant Ford.

THE COURT: Who represents Flynn?

MR. SCHATTEN: My understanding is that when Mr. Flynn appeared in the courthouse previously he was represented by Mr. Chisholm. Since that time he has become a fugitive. He is currently a fugitive. Mr. Chisholm, I believe, is the only attorney of record for him. Maybe Mr. Chisholm could enlighten us.

THE COURT: Flynn is presently a fugitive?

MR. SCHATTEN: Yes.

THE COURT: We will set the trial for November 18th.

MR. SCHATTEN: Yes, your Honor.

THE COURT: We are proceeding only with Mr. Ford.

MR. SCHATTEN: Unless Mr. Flynn subsequently does not become a fugitive.

The Government's position has always been we would [3] like a joint trial in this case for reasons that we repeatedly stated at length not only before, in open court, but also in a sealed affidavit which we filed with Judge Bauman when he had the case. It would still be our position that the appropriate way to proceed in this case would be with both defendants.

We are doing everything we can, as I already pointed out, to see to it that the case proceeds with two defendants.

MR. CHISHOLM: May I clarify one point?

THE COURT: Has the defendant Flynn been a fugitive since the indictment was returned?

MR. SCHATTEN: That's correct. My understanding of the situation is that Flynn failed to appear at the time of his arraignment, and he has never been seen since.

* * * *

THE COURT: Mr. Chisholm, I gather you have a motion on today?

MR. CHISHOLM: Yes, your Honor.

THE COURT: What is that again?

MR. CHISHOLM: That motion is to be furnished with what I contend is exculpatory evidence.

[4] THE COURT: There are many motions in this pile. When was that filed?

MR. CHISHOLM: I believe it was September 30th, your Honor.

THE COURT: I gather a similar motion was previously filed before Judge Bauman, was it?

MR. CHISHOLM: I can clarify that, your Honor. That's not exactly correct, perhaps.

Before Judge Bauman there was a motion filed amongst others. It was a discovery motion for identifying witnesses. That motion was denied, but there was an additional motion filed before Judge Bauman, the one that entitled me to be furnished with evidence favorable to the accused, which had five parts. The judge allowed Parts 2 and 3. As a matter of fact, the Government consented to Parts 2 and 3.

Part 2 was statements which would reasonably tend to show the accused did not commit the offense charged.

Part 3 is evidence which would reasonably tend to show that the accused did not commit the offense charged.

THE COURT: Do you say both of those were allowed by Judge Bauman?

MR. CHISHOLM: Yes, your Honor. The Government consented to them. It is hard to believe that those would [5] be denied in any situation conceivable because it is clearly a request for exculpatory evidence.

After the hearings on those motions, when I did meet with the other Assistant United States Attorney who was handling the case, it was at that time that he refused to disclose, as the judge had denied the motion, the names and addresses of identifying witnesses, but under the exculpatory evidence motion, when we were discussing this, he said he did have exculpatory evidence, and that's the basis of my motion that is now before your Honor, namely, that there was a witness that did identify one of the participants in the robbery. I, for further clarification, labeled that as John Doe. As I understand it from Mr. Rakoff, this was from photographs.

Then, at a later date, some number of months later, the same person, this John Doe, identified the defendant Ford from a series of photographs, and the same person, John Doe, a number of months or a later period of time, saw a man on the street and identified him as the one he had seen participating in the robbery, the same one he had picked out of a photograph, Mr. Ford. I have labeled this person as Richard Rowe. This person was apprehended or interrogated by law enforcement officers and then was released or not taken into custody.

[6] The Government knows both the identity of John Doe and Richard Rowe. He did say that during the trial this information would be made available to me. However, your Honor, if your Honor please, if this is exculpatory evidence—and I suggest one would have to stretch one's imagination to imagine a situation of a more exculpatory evidence greater, anything more exculpatory—in other words, the defendant has many defenses, alibis, many things. Perhaps the defense the defendant can put forth is that he didn't commit the particular crime charged but somebody else did it. The defendant is entitled to prove that.

Now the Government has this witness who will identify the defendant Ford at the trial as being one of the participants in the robbery, and this same identifying witness has identified another person, a person well known to the Government, as being that one. But when it comes to trial he will say that defendant Ford was the one and this was a mis-identification. I don't suggest that's what his testimony will be exactly. I don't know. It will be something along that line.

I take the position that I am entitled to know the name of that identifying witness and the person that was identified.

I know my brother points out, and he quoted from [7] Judge Bauman when he denied the motion for identifying witnesses, but at that time this information was unknown to me, and this information was disclosed to me under the exculpatory evidence motion which was allowed, in fact, but by telling me certain facts without being

more specific as to the names of these people it does nothing.

THE COURT: I will hear from the Government in reply.

MR. SCHATTEN: May it please the Court, your Honor, as the Court has recognized, Judge Bauman, for reasons not only stated in affidavits he filed with Mr. Chisholm, but in a sealed affidavit denied any application with respect to the identification of prospective witnesses. That was 100% clear. The reasons are because, among others, James Patrick Flynn is still at large. He continues to be at large, just as he was on April 25, 1974.

Moreover, the Government would submit that even under a bare reading of Parts 2 and 3 of that provision with respect to exculpatory material, we have fully complied with our burden. We have told Mr. Chisholm—and I think Mr. Chisholm is inaccurate, as I pointed out in my affidavit—in the first place, this witness has never picked out Ford from a photographic spread. I have stated that in my affidavit, and I now state it in court.

[8] Moreover, contrary to what Mr. Chisholm says, the said Richard Rowe has satisfied law enforcement authorities that he did not participate in the robbery.

Mr. Chisholm will be afforded at the time of the trial the names of Richard Rowe and John Doe. We will even give him an opportunity to confer with these people in our office.

He has waited all this time to make the motion. We would submit that there is going to be little harm if the motion, in fact, is denied until such time as the trial takes place. It is hard to see how he would be prejudiced from this result.

Contrary to what Mr. Chisholm says, I must say there are better defenses than the one he claims to present right here and now for the simple reason that we are representing Rowe—and are satisfied—as Mr. Rakoff has already told him, that he did not participate in the robbery. He will be able to put the John Doe and Richard Rowe on the witness stand if he so desires. He will have an opportunity to talk with them during the trial.

We do feel that considerations that pertain in the Judge Bauman ruling are equally applicable now, and we would vigorously oppose having to turn those over.

Moreover, we don't see any prejudice in Mr. [9] Chisholm by not having to turn them over until the time of trial.

THE COURT: Mr. Chisholm, I will hear from you.

MR. CHISHOLM: If it please your Honor, as far as this Richard Rowe having satisfied law enforcement officials of his innocence, that may be true, but I am sure we are all aware that law enforcement officials have been mistaken in judgment from time to time. It is a subjective decision, determination.

But as far as making information available to me in the middle of the trial, that imposes an extra burden upon me on that aspect because in handling, trying, a case, as your Honor knows, there are many things on an attorney's mind. I don't know how they suggest it should be done. Should it be done at a recess at some other time when something very important also should be considered by a defendant? There may be something else that requires my attention.

Also, your Honor, I may want to subpoena John Doe. I may want to subpoena Richard Rowe as witnesses. The Government has never said it is going to use those persons.

Suppose I saw Richard Rowe and John Doe in the Government Attorney's office at some time and they never [10] produced them as witnesses. I may want to call them as witnesses. I would not have the opportunity to subpoena them. They may walk out the door after I see them. How would I produce them in the middle of the trial? These are possibilities, but independent of any of those practical arguments that I urge the Court to consider, I think it is just an absolute right that the defendant has to have exculpatory evidence disclosed to him. It should be disclosed by the Government without motion. The defendant doesn't need a motion for exculpatory evidence. It is usually filed, and the Government's duty is to disclose it as soon as it is aware of anything that is exculpatory.

THE COURT: Well, the Government has met that burden by telling you about it.

The next question is whether you have a right to have the names of these witnesses so that if they are willing they can talk to you about the case before the trial. Isn't that so? That's what we are really talking about. The Government has told you about it. They have met their obligation to tell you about any possible exculpatory evidence.

The issue now is whether you have a right to the names of those individuals. The Government claims that the names should be withheld because one of the co-defendants [11] here is a fugitive and both of these co-defendants have previously been convicted of crimes of violence.

Is that right?

MR. SCHATTEN: That's correct, your Honor.

THE COURT: I thought I read that in the Government's affidavit somewhere.

MR. SCHATTEN: That's correct.

MR. CHISHOLM: The defendant Ford is in custody serving an eight-year sentence that the Commonwealth of Massachusetts imposed earlier this year. I think his activities are restrained. He has a detainer on him for this charge. There is no way he could be released for five or six years anyway.

THE COURT: What about Flynn?

MR. CHISHOLM: Your Honor, I suggest the Government has not met its burden except in maybe only in part by disclosing to me there is this situation. The Government has not told me very much except it does have some exculpatory evidence. If they have that evidence, they must disclose it, but they have not done that other than in a vague way. I suggest to the Court that this situation does exist. That's not disclosing—

THE COURT: The Government asks the identity be protected until the time of trial for the reasons indicated, [12] and the question is whether that is a sufficient reason to deny you the identity of the prospective witness until time of trial. It seems to me clear that that is,

since Flynn is a fugitive and previously convicted of a crime of violence, reasonable.

MR. CHISHOLM: I respectfully disagree with the Court's conclusion on that. There has been no showing here by the Government that anyone has attempted to interfere in any way with the liberty or safety of any witness for the Government. There is no suggestion here that there is any information, anything remote, that anyone even considered such a thing. The very fact that someone has been convicted of a crime of violence—I am concerned with the defendant Ford, he is in custody, and these are his rights that I am asking the Court to consider, and not the rights of the defendant Flynn, if he has any.

THE COURT: Also, the Government has represented that it has investigated this Richard Rowe and is satisfied that he did not participate in the robbery. They have made that representation.

You would have to be suggesting that the Government is interested in having your client convicted for a crime committed by somebody else. We have to accept the Government's representation that it investigated this [13] Richard Rowe and found that he could not be indicted for this crime and brought to trial.

MR. CHISHOLM: I don't know, your Honor, other than what the Government attorney has told your Honor here, and I heard a similar statement by Mr. Rakoff before. Someone has determined that. I don't know what that determination was based upon. I don't know to what extent the Government investigated this so-called Richard Rowe or why the Government determined that he was not involved. Perhaps he was in a penal institution at the time. That would be a reason. I don't know about other alibis.

THE COURT: That goes as to whether there is a real need to have this name, in any event. We are not here for mere exercise. There ought to be some reason why this name ought to be disclosed if it would possibly help your defendant.

MR. CHISHOLM: So that I, a representative of the defendant, an investigator—not me—could have an opportunity to interview these persons and discuss the facts relevant to this case.

THE COURT: Normally you would not have the opportunity unless the witness was willing to be interviewed. The suggestion here is that it is not a normal situation because of the possible threat to the life of anybody who [14] might be a witness, that is this Richard Rowe might disclose who John Doe is, and I gather he is the one that the Government is trying to protect?

MR. SCHATTEN: Yes, your Honor. Your Honor hit the nail right on the head. That's exactly the Government's position.

For the reasons that were set forth by Judge Bauman, for the reasons set forth in our sealed affidavit, for the reasons set forth in this affidavit that I filed, I respectfully urge your Honor to rule as your Honor is inclined.

MR. CHISHOLM: May I just state one point, your Honor?

The Government's attorney suggested on two or three occasions this afternoon that Judge Bauman has denied this. Judge Bauman denied a bare discovery motion just for identification, a discovery of identification proceedings. He did allow part of the exculpatory evidence motion, and that is what I am directing the Court's attention to. It is that part of the exculpatory evidence motion, that the Government's attorney disclose to me the information about John Doe and Richard Rowe.

Before we were talking about identifying witnesses. Suppose we have a person that identifies the defendant Ford [15] from photographs. That part was denied. It was unknown. It was not brought to the Court's attention when Judge Bauman heard these motions. I was unaware of it until afterwards that one of these identifying witnesses identified somebody else as the defendant Ford, but, presumably, this person will pick out the defendant Ford as the robber. But he previously identified another person. That was never brought to Judge Bauman's attention, and that clearly is exculpatory evidence. I am not asking for all witnesses, all identifying witnesses, because that motion has been denied, but this

is a very limited motion before your Honor for this John Doe, the identifying witness, and Richard Rowe, the one he identified. It is just very limited.

Judge Bauman had no knowledge of this at the time he ruled on the motion.

THE COURT: With respect to your present motion for an order directing the Government to turn over to you the names of John Doe and Richard Rowe, that motion is denied for the reasons already indicated on the record, and that is that one of the co-defendants in this case, James Patrick Flynn, is a fugitive and has been since the arraignment in this case, and he has previously been convicted of a crime of violence.

[17] THE COURT: How many witnesses do you think you will have and how long will this trial take?

MR. SCHATTEN: I have conferred with my colleague, Mr. Bornstein, who is slightly more familiar with certain aspects of the case. We are trying to work out stipulations with Mr. Chisholm. Failing his willingness to work out stipulations, I would have to tell the Court there would be somewhere around 30 or 35 witnesses. Hopefully we could stipulate to certain items and I would hope Mr. Chisholm would act reasonably in accordance with this Court's practices; but, failing that, we will be talking about a [18] maximum or 30 or 35 witnesses.

THE COURT: 30 to 35?

MR. SCHATTEN: Most of whom would be short. There are a number of document witnesses and the like.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 CBM

[Memo Endorsed]

UNITED STATES OF AMERICA

—*v*—

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas",
a/k/a "John A. August", DEFENDANTS

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that, at a time and place convenient to the Court, the Government will move this Court for an order adjourning the trial of the above-entitled case, presently scheduled for November 18, 1974, for a period of approximately 90 days or until the apprehension of the fugitive co-defendant Flynn, whichever period is shorter.

This motion is based on this notice, the annexed affidavit of Assistant United States Attorney Steven A. Schatten for the Government, and all the papers and proceedings heretofore in this case.

Dated: New York, New York
November 1, 1974.

Yours, etc.

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States of America

By: /s/ STEVEN A. SCHATTEN
Assistant United States Attorney

TO: RONALD J. CHISHOLM, ESQ.
Three Center Plaza
Boston, Massachusetts 02108
(Attorney for defendant Ford)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 (CBM)

UNITED STATES OF AMERICA

v.

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas",
a/k/a "John A. August", DEFENDANTS

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

STEVEN A. SCHATTEN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and have responsibility for the prosecution of the above-captioned case. I make this affidavit in support of the Government's motion for an adjournment of the trial of this case, presently scheduled (as to defendant Ford) for November 18, 1974, for a period of approximately 90 days or until the apprehension of the fugitive co-defendant Flynn, whichever period is shorter.

2. The Government respectfully submits that such an adjournment would fully comport with this District's Plan for Achieving Prompt Disposition of Criminal Cases (the "Speedy Trial Rules"), would be in the best interests of justice and judicial management, and would not prejudice defendant Ford in any material respect.

3. Ford escaped from a Massachusetts prison sometime prior to 1970 (I believe, 1968). A Massachusetts warrant charging him with escape and assault with intent to murder issued as a result. The Government expects to prove that in 1971, while living in Greenwood Lake, New York, under the alias "Vincent A. Thomas," he joined with co-defendant Flynn and others to commit the armed bank robbery and ancillary crimes charged in the instant indictment. At any rate, a federal warrant based on a complaint charging Ford with the bank robbery was issued in 1971. Ford, however, remained a fugitive until October 11, 1973, when he was captured in Chicago under the name "John A. August."

4. Upon his capture, Ford was turned over to Massachusetts authorities to stand trial on the prior state charges, and the federal warrant was lodged as a detainer. (About this same time, Ford wrote a letter to the Southern District of New York requesting a Speedy Trial on the federal charges.) On February 8, 1974, midway through his trial in Massachusetts, Ford changed his plea to one of guilty on charges of escape, assault with intent to murder, and related charges. He was sentenced forthwith to concurrent terms of 8 to 10 years imprisonment, which term he is presently serving. The judgments were entered that same date, February 8, 1974.

5. Hence, February 8, 1974, is, at earliest, the date on which the "six-month period" under the Speedy Trial Rules began to run as to Ford.* This is because the period prior to October 11, 1973, during which time he was a fugitive, is a period excluded from the six-month computation by virtue of Rule 5(d) of the Speedy Trial Rules, which treats as an excluded period "The period of delay resulting from the absence or unavailability of the defendant." Similarly, the period from October 11, 1973, until the disposition of the Massachusetts charges on February 8, 1974, is an excluded period by virtue of any of three separate provisions: Rule 5(d), *supra;* Rule 5(f),

* The shorter, "three-month period" for detained defendants does not apply to "any defendant who is serving a term of imprisonment for another offense . . . ." Rule 3 of the Speedy Trial Rules.

which excludes "The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial;" ** and, particularly, Rule 5(a), which excludes "The period of delay while proceedings concerning the defendant are pending, including but not limited to. . . trial of other charges, and the period during which such matters are *sub judice.*" See, *e.g., United States* v. *Cangiano*, 491 F.2d 906, 909 (2d Cir. 1974).

6. On March 21, 1974, a two-count Indictment (74 Cr. 279), charging Ford with the 1971 armed bank robbery, was filed in this District. Ford was arraigned before Judge Tenney on April 1st at which time he refused to be fingerprinted. The case was assigned to Judge Bauman for all purposes. Also on April 1st, the Government filed a notice of readiness as to defendant Ford.

7. On April 3, 1974, the Grand Jury voted a superseding indictment, charging Ford, Flynn and others unnamed, with the bank robbery, conspiracy, and related crimes. Flynn, who had appeared before the Grand Jury in March (*at which time he was represented by Ford's present attorney, Ronald Chisholm*), appears to have become a fugitive immediately thereafter. As of now, he still has not been apprehended. Accordingly, none of the "six-month period" has run as to Flynn. Rule 5(d), *supra.*

8. On April 15, 1974, Ford, now represented by Mr. Chisholm, entered a not guilty plea to the present indictment. Ford was given 10 days for motions. A hearing was also held on the Government's motion (first made on April 1st) for physical exemplars; when Ford refused to provide handwriting, handprinting, and hair samples, he was given one week to comply with this Court's order to furnish the same or else face contempt.

9. On April 25, 1974, following Ford's continued noncompliance with respect to the furnishing of hair samples, Ford was held in civil contempt by this Court and

** The "reasonable efforts" provision, in a context such as this, appears to be satisfied by filing a detainer, as was done here. See Rule 9(b)(ii), Speedy Trial Rules.

warned of the further possibility of criminal contempt. Also, on April 25th, this Court ruled on defendant's pretrial motions, made that same day. But as of now, Ford still has not complied with this Court's order.

10. On May 16, 1974, the Government filed a motion for an order adjourning the trial of this case for a period of 90 days or until the apprehension of the fugitive co-defendant Flynn, whichever period was shorter. The Government's motion was granted by Judge Bauman.

11. In August 1974, this case was reassigned to the Hon. Constance Baker Motley, United States District Judge, and trial was set down for November 18, 1974.

I. THE INTERESTS OF JUSTICE AND SOUND JUDICIAL MANAGEMENT SUPPORT THE REQUESTED ADJOURNMENT, AND DEFENDANT IS NOT PREJUDICED BY IT.

12. The underlying fact which forces the Government to request this adjournment is that the co-defendant Flynn took flight at the time of his indictment and has not been apprehended. While, of course, there is no guarantee that Flynn can be apprehended within any given period of adjournment, the Government respectfully submits, that, given all of the circumstances here involved the Government is entitled to an additional, reasonable further delay in order to try to apprehend him.

13. The reasons why the fugitive status of Flynn warrants an adjournment with respect to the incarcerated co-defendant Ford are two, each of which, incidentally, constitutes grounds of delay under the Speedy Trial Rules.

14. First, the need to try the case twice would put an unwarranted strain on the time and resources of the Government and this Court. This case involves no ordinary bank robbery, but rather a far-flung conspiracy which was calculated to conceal the identities of the robbers and which entailed, merely by way of preparation for the robbery, the commission of substantive crimes in at least three States. (The robbery itself netted over $200,000.) At present the Government, even if it puts

on a "thin" case, anticipates that it will have to call a minimum of 27 witnesses from all over the country. The Government submits that sound management warrants avoidance of having not one but two trials of this length, when there is a realistic possibility that the fugitive Flynn can be apprehended and there is no compelling reason to move forward as to the non-fugitive Ford.

15. Second, of course, the Court is already aware from the Government's representations at the October 16, 1974 hearing that the fugitive Flynn is a former felon (having at least three prior convictions for such crimes as armed robbery); and Flynn is considered by the FBI to be armed and dangerous and thus, inherently, a potential danger to Government witnesses. Specifically, this danger was brought to the attention of the Court on April 25 and again on October 16, in the context of defendant's motions for the names of Government witnesses. The Government opposed motions stating at the April 25 hearing

> "We do object to revealing the persons to whom the photo spreads were shown, because one of the defendants here is a fugitive armed and dangerous, and we feel there is a danger for that reason." (April 25 Hearing Transcript, pp. 3-4)

In ruling in the Government's favor on this point on both occasions, this Court has indicated to defense counsel (who, as noted, *was previously counsel for the fugitive as well*):

> "Let me make this clear to you. I am not going to do anything that will identify the prospective identification witnesses to you. What I will do is to cause to be made available to you the spread of pictures so that you can see those pictures so that you can be prepared for whatever kind of identification hearings you want in the light of having seen the spread of the pictures. Is that clear? But I certainly am not going to have you told the names of the people who have made the identification, where one dangerous criminal is walking the streets. Now,

I am not—I have not lost my senses yet and I suggest that I am not about to do that." (April 25 Hearing Transcript, p. 8)

See also October 16 Hearing Transcript.

The Government submits that these same strong considerations that prompted this Court on April 25 and once again on October 16 to deny identification of the Government witnesses to defense counsel prior to the Ford trial, so long as Flynn was a fugitive, just as strongly warrant adjournment of the trial altogether while Flynn remains a fugitive and while there is no compelling reason against a few months' adjournment for the purpose of trying to apprehend the fugitive.

16. Each of the above considerations finds support in particular provisions of the Speedy Trial Rules. To begin with, the general provision of Rule 5(h) providing for a "period of delay occasioned by exceptional circumstances" has been applied by our Court of Appeals to sanction delay in situations generally analogous to the present one. For example, in *United States* v. *Rollins*, 487 F.2d (2d Cir. 1973), the Government, without even notifying the Court, failed to bring the case to trial within six months, partly from inexcusable inadvertance but partly because the Government's secret witness was himself under suspicion in another investigation that might be compromised if he took the stand and revealed his cooperation with the Government. The Court of Appeals, applying Rule 5(h), refused to dismiss the indictment, stating "the public interest in prompt adjudication must be balanced against competing interests." (487 F.2d at 414). Similarly, in United States v. Cuomo, 479 F.2d 688 (2d Cir. 1973), *cert. denied* —— U.S. —— (1974), a ninety-day adjournment to protect the safety and usefulness of an informant was held to be an "excluded period" in terms of the Speedy Trial Rules.

17. A more specific provision of the Speedy Trial Rules that is also very much in point is Rule 5(e), providing for "A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good

cause for not granting a severance." * Applying this provision very recently in United States v. Cangliano, 491 F.2d 906, 909, our Court of Appeals found "good cause" for not granting a severance in the mere fact that the defendant there had not specifically moved for a severance and did not, in any case, make any showing or prejudice suffered from the delay resulting from the lack of severance. Here, likewise, defendant Ford has neither specifically moved for a severance nor made any showing of prejudice from delay (as set forth below, there is no prejudice). But, additionally, in the present case there are the positive reasons to avoid severance, already set forth above, if possible, until Flynn is apprehended.

18. Finally, defendant Ford will not in any way be prejudiced by the proposed 90-day adjournment. Ford himself is now serving of several 8-10 year concurrent sentences imposed last February; his personal freedom will thus, not be in any way curtailed by the adjournment. As to the preparation of his defense, the adjournment can only aid it. If the adjournment is granted, Ford will undoubtedly continue to remain in the Walpole, Massachusetts prison where he is serving his present sentence, and thus will be readily available to Mr. Chisholm for pre-trial consultations.

II. THE ADJOURNMENT WILL COMPORT WITH THE SPEEDY TRIAL RULES

19. Some or all of the period from April 1st to the present must be excluded from the computation of the six month period that began to run on February 8, 1974, for at least two reasons:

20. First, under Rule 5(a), there must be excluded "The period of delay while proceedings concerning the defendant are pending, including but not limited to pretrial motions . . . trial of other charges . . . and the

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* Rule 5(e) continued: "In all other case the defendant should be granted a severance so that he may be tried within the time limits applicable to his case."

period during which such matters are *sub judice*." The Government's pre-trial motion that defendant furnish various physical exemplars, including fingerprints, handwriting, handprinting, and hair samples, was first made orally before Judge Tenney on April 1st and then, when the case was assigned to Judge Bauman, made in writing in motion papers filed April 2, 1974. This motion, and the attendant contempt proceedings, were not completed (if, indeed, they can be said to be completed as of now, since criminal contempt proceedings against Ford are still pending unless he purges himself of his civil contempt) until April 25, 1974, when this Court found Ford in civil contempt. Thus, the period from April 1st through April 1st through April 25th should be excluded from computation of the six-month period.

21. Second, Rule 5(c)(i) excludes from the six-month period the period of time during which "evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period." Clearly, the Government has exercised due diligence in an attempt to obtain evidence of defendants hair samples. There would appear to be some reasonable grounds, moreover, for believing that the defendant Ford will eventually make this evidence available, since he for some time also refused, but eventually complied, with Court orders to supply fingerprints (admittedly not nearly so vital in this case, since the bank robbers wore gloves) and handwriting and handprinting (also, admittedly, of less value on the facts of this case). Alternatively, even if there is no longer any reasonable expectation that defendant will supply the hair samples (or, what is the same thing, supply them in time that a pre-trial scientific comparison can be made), surely defendant is estopped from invoking the benefits of the Speedy Trial Rule when he himself is the sole cause of the unavailability of potentially crucial evidence without which the Government will be forced, through no fault of its own, to go to trial less materially prepared than it ought to be. In short, it is submitted that, pursuant

to Rule 5(c)(i), there should be excluded from the six month period the entire time from April 1st through the present (and continuing), in which defendant has refused to make material evidence available—at least until such time as the Court concludes that there is no reasonable ground for supposing that such evidence will become available within a reasonable period.

22. If the entire period from April 1st through the present is excluded from the six-months computation, only 51 days of the 180 days grace-period permitted by the Speedy Trial Rules has actually run, *i.e.*, February 9, 1974, through March 31, 1974. (The letter of the Speedy Trial Rules binds the Government to be ready for trial, but it does not bind the Court in actually setting a trial date, *United States* v. *Cacciatore*, 487 F.2d 240, 243, n.2 (2d Cir. 1973)—although it, of course, furnishes a kind of guideline against which this Court can utilize to ascertain the reasonable exercise of its discretion.)

WHEREFORE, the Government respectfully requests that this Court adjourn the trial of the instant case for approximately 90 days from the presently scheduled trial date (November 18, 1974) or until the apprehension of the fugitive co-defendant Flynn, which ever period is less.

/s/ Steven A. Schatten
STEVEN A. SCHATTEN
Assistant United States Attorney

Sworn to before me this 1st day of November, 1974.

/s/ Alma Hanson
ALMA HANSON
Notary Public, State of New York
No. 24-6753450 Qualified in Kings Co.

Certificate filed in New York County

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 (CBM)

[Filed Nov. 6, 1974]

UNITED STATES OF AMERICA

—*v*—

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas,"
a/k/a "John A. August", DEFENDANTS

NOTICE OF MOTION & AFFIDAVIT

PAUL J. CURRAN
United States Attorney
Attorney for USA
Tel. 791-1931

The written motion is granted. The trial of this action is scheduled to begin on February 18, 1975 as to defendant Ford.

Dated: N.Y., N.Y.
11/4/74

SO ORDERED
/s/ Constance Baker Motley
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 CBM

[Memo Endorsed]

UNITED STATES OF AMERICA

—*v*—

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas,"
a/k/a "John A. August", DEFENDANTS

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that, at a time and place convenient to the Court, the defendant will move this Court for an order dismissing the indictment as to the defendant Richard T. Ford for the reasons that he has been denied his rights to a speedy trial as guaranteed to him by the Federal Constitution and the Rules of the Southern District of New York.

This motion is based on this notice, the annexed affidavit of Ronald J. Chisholm and all the papers and proceedings heretofore in this case.

DATED: Boston, Massachusetts
November 4, 1974.

Yours, etc.

/s/ Ronald J. Chisholm
RONALD J. CHISHOLM
Attorney for Richard T. Ford

TO: STEVEN A. SCHATTEN, ESQUIRE
Assistant United States Attorney
Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 (CBM)

UNITED STATES OF AMERICA

—*v*—

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas,"
a/k/a "John A. August", DEFENDANTS

AFFIDAVIT

STATE OF MASSACHUSETTS:)
COUNTY OF SUFFOLK:) ss.

RONALD J. CHISHOLM, being duly sworn, deposes and says:

1. I am attorney for defendant Richard T. Ford in the above case. I make this affidavit in support of the defendant Ford's Motion for Dismissal.

2. The defendant Ford was arrested on or about October 11, 1973 in Chicago on a warrant charging Ford with robbery, the subject matter of this indictment on a complaint that was issued November 11, 1971.

3. When Ford was arrested by federal authorities he was not brought to this jurisdiction to answer to this charge but instead was turned over to Massachusetts authorities to answer to other charges pending in the Commonwealth of Massachusetts.

4. A few days after being arrested in Chicago defendant Ford wrote a letter dated September 28, 1973 (undoubtedly meant to be October 28, 1973) to the U.S. Chief Justice for the Southern District of New York in-

sisting upon a speedy trial. A copy is attached hereto marked Exhibit A. Defendant Ford also wrote an identical letter to the United States Attorney for the Southern District of New York insisting on a speedy trial. A copy is attached hereto marked Exhibit B.

5. In March, 1974 Ford was indicted by the Grand Jury of the Southern District of New York for this offense.

6. On April 1, 1974 Ford was brought before this Court for arraignment but the arraignment was continued until April 8, 1974 to allow Ford the opportunity to obtain counsel.

7. On April 1, 1974 the government filed an affidavit of readiness.

8. On April 3, 1974 Ford's arraignment was continued until April 15, 1974. On April 3, 1974 the Grand Jury voted a superseding indictment charging Ford and others with the same robbery.

9. On April 15, 1974 Ford was arraigned on this indictment and pleaded not guilty.

10. On April 25, 1974 pretrial motions were heard. On April 25, 1974 the Court set May 28, 1974 for trial of this indictment (co-defendant Flynn was defaulted on April 15, 1974).

11. On May 22, 1974 Judge Bauman granted the government's motion for a continuance of ninety days or until the apprehension of co-defendant Flynn, whichever occurred first. This motion was granted over the defendant's objection and the case was set for trial for August 21, 1974.

12. Approximately August 16, 1974 I received notice that the defendant Ford's trial had been continued until November 18, 1974. This continuance was without the defendant Ford's assent and over his objection.

13. The government admittedly has exculpatory evidence which it refuses to disclose until after the trial has commenced. This exculpatory evidence is not documentary but identification evidence previously brought to the Court's attention on other motions. This evidence may not be available at a later time or if it is the quality may be weakened through the lapse of time.

14. The defendant Ford is being denied furlough privileges afforded to him by the Commonwealth of Massachusetts while serving a sentence in Massachusetts while a detainer on this charge is lodged against him.

WHEREFORE, the defendant Ford respectfully requests that this Court dismiss the indictment as to him.

/s/ Ronald J. Chisholm
RONALD J. CHISHOLM
Attorney for defendant Ford

Sworn to before me this 4th day of November, 1974.

/s/ Albert J. Capone, Jr.
Notary Public

My commission expires: April 29, 1977

[SEAL]

EXHIBIT A

9-28-73
Mr. Richard Ford
Registered #7306192
Tier H-2 Cell
2600 California Ave.
Chicago, Ill.

U.S. Chief Justice for Southern District of New York
United States Court House
Foley Square
New York City, New York

Dear Sir:

I am taking this opportunity to advise you that I, Richard Ford, am presently in the custody of the Cook County Sheriff, State of Illinois, awaiting extradition to the State of Massachusetts, Essex County House of Correction to stand trial for escape.

This is to further advise you that the Federal authorities in and for the People of the United States of America, Southern District of New York have placed a Federal Detainer against me for Bank Robbery (information # U.S.C. 2113-A and 2)

Therefore, I, Richard Ford, ask this Honorable Court to move in the following matter:

(1) That you make a Certified Copy of this Statement whereby proving that I, Richard Ford, have notified this Honorable Court of my whereabouts, and file same on Court Record.

(2) That this Honorable Court take action upon this Notification of my Whereabouts, and bring petitioner Richard Ford to the State of New York to stand trial for and/or the charges in information # U.S.C. 2113-H- and 2 be dropped.

All this enabling Richard Ford to be Garanteed Equal Protection under the Law; to be tried or released from the charges set forth in information # U.S.C. 2113-H-and 2 in the ammount of time set forth in the United States Constitution.

Petitioner, Richard Ford, retains the Right to a Speedy Trial, as well as his plea of not guilty.

Richard Ford further states that this is not a petition —but a letter asking for my Constitutional Rights to a Speedy Trial.

Sincerely

Richard Ford

R.F. Enclosures: one

EXHIBIT B

9-28-73
Mr. Richard Ford
Registered #7308694
Tier H-2 Cell
2600 California Ave.
Chicago, Illinois 60608

U.S. Attorney for Southern District of New York
United States Court House
Foley Square
New York City, New York

Dear Sir:

I am taking this opportunity to advise a duly authorized representative of the People of the United States of America, that I, Richard Ford, am presently in the custody of the Cook County Sheriff, State of Illinois; awaiting extradition to the State of Massachusetts, Essex County House of Correction to stand trial for escape.

This is to further advise you that the Federal authorities in and for the People of the United States, Southern District of New York, have place a Federal Detainer against me for Bank Robbery. (Information # U.S.C. 2112-A-and 2)

Therefore, I petition you, a duly authorized Attorney for the people of the United States of America, Southern District of New York, as follows:

(1.) That you make Certified Copies of this Statement, whereby proving that I, Richard Ford, have notified the Court as to my whereabouts, and filing same on Court Record.

(2.) That you take action on this notification of my whereabouts and bring petitioner, Richard Ford to the State of New York to stand trial for and/or the charges alleged in information # U.S.C. 2113-A-and 2 be dismissed.

All this enabling petitioner, Richard Ford, to be Garanteed Equal Protection under the law; to be tried or re-

leased from charges set forth in information #U.S.C. A-and 2—in the amount of time set forth in United States Constitution.

Petitioner, Richard Ford, retains the Right to a Speedy Trial, as well as his plea of not guilty.

Petitioner further states he is not a well educated man. This is not a petition but a letter asking for my Constitutional Rights.

Sincerely

Richard Ford

R.F. Enclosures: one

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 (CBM)

[Filed Nov. 6, 1974]

UNITED STATES OF AMERICA

—*v.*—

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas",
a/k/a "John A. August", DEFENDANTS

NOTICE OF MOTION AND AFFIDAVIT

RONALD J. CHISHOLM, ESQUIRE
Three Center Plaza
Boston, Massachusetts 02108
(617) 426-8688

For the reasons set forth in the record this date, the written motion is denied.

SO ORDERED

Dated: N.Y., N.Y.
11/4//74

/s/ Constance Baker Motley
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 336

UNITED STATES OF AMERICA

v.

JAMES PATRICK FLYNN, AND
RICHARD THOMSON FORD, DEFENDANTS

February 18, 1975
10 a.m.

BEFORE: HON. CONSTANCE BAKER MOTLEY, District Judge

APPEARANCES:

Don Buchwald, Esq.,
Assistant United States Attorney

Ronald Chisholm, Esq.,
Attorney for Defendant Ford

[2] THE COURT: This case, I gather, gentlemen, was supposed to proceed to trial today.

MR. BUCHWALD: That's correct, your Honor.

THE COURT: What's happened here is that I have been on trial in a case since January 22nd, I believe. It was scheduled to go to trial January 14, and there was a stay pending an appeal to the Court of Appeals for a week. After that both United States Attorneys were ill, and that effectively caused a delay of a week. We have just lost two additional days, last Friday and yesterday.

The long and short of which is we have not yet completed the trial now on trial. Since this case involves out of town counsel I thought you should come in and

we would try to set a date certain, while I continue with the case.

I think that is what we should do now. Are all parties represented? Do you represent both defendants?

MR. CHISHOLM: No, your Honor, just the defendant Ford.

MR. BUCHWALD: The defendant Flynn is still in a fugitive status, your Honor, and though Mr. Chisholm will represent him at one point in the proceeding it appears we will be proceeding against Mr. Ford alone unless Mr. Flynn is apprehended in the interim.

[3] THE COURT: I see.

MR. BUCHWALD: With respect to the matter of a new date, your Honor, while the government has no particular preference in the matter we would hope that any date set could be set with a view toward making it most probable, but we could proceed in view of the fact that we would estimate over thirty witnesses, most of whom are civilian witnessea, not agents, who live—we have witnesses from upstate New York, California, Chicago, and while we don't think that the trial will be as long as the number of witnesses would indicate, because a number of them are relatively short witnesses, we would hope that the subpoenas we hand out, that the people can be here.

I am trying to get them to juggle their vacation schedules to meet the needs of the trial.

THE COURT: How long do you estimate it will take the government to put on its case?

MR. BUCHWALD: I have discussed various stipulations with Mr. Chisholm this morning, and in view of some of the stipulations we have tentatively agreed upon I would think five or six trial days. I would think that that is probably realistic. I might be a little bit optimistic, but I would think five or six trial days for the government's case.

[4] THE COURT: It will be set for Wednesday, June 11th, at ten o'clock.

MR. CHISHOLM: May I just say for the record, your Honor, that the defendant Ford would object to the continuance for such a long period of time. I do realize the

Court has a case on trial now, but in view of his former motion to dismiss because of being denied a speedy trial, I think I have to be consistent.

THE COURT: The only thing I can say, Mr. Chisholm, is that when this trial is over we can try to move the date up. When the case is over I will contact you to try to advance the date. But from looking at my calendar now this is the earliest date that I will be able to try it.

I will review the matter after the instant trial is over.

MR. BUCHWALD: Thank you, your Honor.

(Time noted: 10:15 a.m.)

DDB:ais
71-3397

March 28, 1975

Honorable Constance Baker Motley
United States District Judge
Southern District of New York
Federal Courthouse
Room 2001
Foley Square
New York, New York 10007

Re: United States v. Ford and Flynn; S74 Cr. 279

Dear Judge Motley:

I am writing in connection with the above matter which is presently on Your Honor's calendar for trial of defendant Richard Ford on June 11, 1975. It has been estimated that the trial will last one to two weeks. It is a case involving an alleged $200,000 robbery in 1971 of a bank in Middletown, New York. The co-defendant, Flynn, is in a fugitive status. Ford is presently incarcerated as a result of an unrelated Massachusetts conviction.

Opposing counsel and myself have entered into a number of stipulations and are considering orders which I hope will reduce the number of witnesses and the length of trial. Nonetheless, at the present, the Government contemplates calling in excess of 30 witnesses, most of whom are not law enforcement agents and some of whom live at great distance from New York. Since the setting of the June 11th trial date, the District Court has indicated that the month of June will be largely devoted to the trial of civil cases.

In view of the number of witnesses on call and their often expressed desire to be notified as far as in advance as possible of any change in the trial date, so that they might plan their own personal work schedules and vaca-

tions. Accordingly, I would most appreciate being advised by the Court of the present status of this matter on Your Honor's calendar.

Respectfully yours,

PAUL J. CURRAN
United States Attorney

By: _____
DON D. BUCHWALD
Assistant United States Attorney
Telephone (212) 791-1921

cc: Ronald J. Chisholm, Esq.
Three Center Plaza
Boston, Massachusetts 02108

DB:js
71-3397

April 28, 1975

Ronald J. Chisholm, Esq.
Three Center Plaza
Boston, Massachusetts 02108

Re: United States v. Richard T. Ford;
S 74 Cr. 336 (CBM)

Dear Mr. Chisholm:

In connection with the trial of the above-mentioned matter, presently scheduled for September 2, 1975 I am enclosing herewith:

(a) the original and two copies of a proposed stipulation pertaining to the testimony of Joan L. Swift, County Recorder of Clark County, Nevada, concerning, more particularly, the marriage of your client (under the name Joseph Michael Fitzgerald)

to his wife, Ellen G. Dempsey, on February 4, 1970. In connection with this matter which we have previously discussed, I am also enclosing a copy of an FBI Report pertaining thereto;

(b) the original and two copies of an updated "Hertz" stipulation which you have indicated you will recommend to your client. Copies of the relevant FBI reports pertaining to this testimony have previously been furnished to you.

Please execute and return to me the original and one copy of each stipulation (retaining one copy for your files). Please advise as soon as possible if either stipulation is unsatisfactory.

Very truly yours,

PAUL J. CURRAN
United States Attorney

By: _____
DON D. BUCHWALD
Assistant United States Attorney
Telephone: (212) 791-1989

Enclosures

USA-33s-19—p. 1—AFF. FOR W/H/C AD PROS.
Rev. 1/30/74
DDB:cf
71-3397

[Writ Iss. Ret. Pet. 9/2/75]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S 74 Cr. 336 (CBM)

[Filed Aug. 8, 1975]

UNITED STATES OF AMERICA

—*v*—

RICHARD FORD, DEFENDANT

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

DON D. BUCHWALD, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York; that he has charge of the prosecution of the above named case; that the defendant RICHARD FORD has been indicted by the Grand Jury for the Southern District of New York for the unlawful robbery of a bank in violation of 18 U.S.C. § 2113(a). The indictment was filed in the United States District Court for the Southern District of New York on ———————. The defendant is now confined in Massachusetts Correctional Institute—Norfolk as Prisoner No. 21646 on a charge of violating sections of

state law involving prison escape and attempted murder and his confinement will terminate at a time unknown to deponent.

That the case is now on the calendar of the United States District Court for the Southern District of New York for September 2, 1975 at 9:30 a.m. in Courtroom 318 and it is necessary that the defendant appear and stand trial at that time.

WHEREFORE, your deponent respectfully prays that a writ of habeas corpus ad prosequendum issue, directing the Warden of Massachusetts Correctional Institute-Norfolk, Massachusetts and the United States Marshal for the Southern District of New York to produce the above named defendant in the United States District Court for the Southern District of New York, United States Court House, Foley Square, New York, N.Y., on September 2, 1975 at 9:30 a.m. in Courtroom 318 and after the said defendant has been discharged or convicted and sentenced on said indictment, to return him to the Massachusetts Correctional Institute-Norfolk.

/s/ Don D. Buchwald
DON D. BUCHWALD
Assistant United States Attorney

Sworn to before me this 8th day of August, 1975

/s/ Alma Hanson
ALMA HANSON
Notary Public, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 CBM

[Filed in Court Sep. 2, 1975]

[Filed Sep. 4, 1975]

UNITED STATES OF AMERICA

v.

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas",
a/k/a "John A. August", DEFENDANTS

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that, at a time and place convenient to the Court, the defendant will move this Court for an order dismissing the indictment as to the defendant Richard T. Ford for the reasons that he has been denied his rights to a speedy trial as guaranteed to him by the Federal Constitution and the Rules of the Southern District of New York.

This motion is based on this notice, the annexed affidavit of Ronald J. Chisholm and all the papers and proceedings heretofore in this case.

DATED: Boston, Massachusetts
August 29, 1975

Yours, etc.

/s/ Ronald J. Chisholm
RONALD J. CHISHOLM
Attorney for Richard T. Ford

The foregoing and attached motion to dismiss for lack of speedy trial denied.

SO ORDERED

N.Y., N.Y.
9/3/75

/s/ Constance Baker Motley
U.S.D.J.

DON BUCHWALD, ESQUIRE
Assistant United States Attorney
Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S. 74 Cr. 336 (CBM)

UNITED STATES OF AMERICA

v.

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas",
a/k/a "John A. August", DEFENDANTS

AFFIDAVIT

STATE OF MASSACHUSETTS:)
) ss.
COUNTY OF SUFFOLK:)

RONALD J. CHISHOLM, being duly sworn, deposes and says:

1. I am attorney for the defendant Richard T. Ford in the above case. I make this affidavit in support of the defendant Ford's Motion for Dismissal.

2. On November 4, 1974, the defendant's Motion to Dismiss the indictment for denial of speedy trial was denied by Judge Motley.

3. On November 4, 1974, Judge Motley set this case for trial for February 18, 1975.

4. On February 18, 1975, Judge Motley set this case for trial for June 11, 1975. This continuance was over the defendant Ford's objection.

5. Prior to June 11, 1975, Assistant United States Attorney, Don Buchwald, advised me that the Court had continued this case to September 2, 1975 for trial. This was without the defendant Ford's consent and over his objection.

WHEREFORE, the defendant Ford respectfully requests that this Court dismsis the indictment as to him.

/s/ Ronald J. Chisholm
RONALD J. CHISHOLM
Attorney for defendant Ford

Sworn to before me this 29th day of August, 1975.

/s/ Joseph L. Sullivan
Notary Public

My commission expires: Feb. 19, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 336

UNITED STATES OF AMERICA

v.

JAMES PATRICK FLYNN AND
RICHARD THOMSON FORD,
a/k/a "Vincent A. Thomas",
a/k/a "John A. August", DEFENDANTS

Before: HON. CONSTANCE BAKER MOTLEY, District Judge.

September 2, 1975
9:50 a.m.

APPEARANCES:

For the Government:

DON BUCHWALD, ESQ.,
Assistant United States Attorney

For the Defendant Ford:

RONALD CHISOLM, ESQ.

[2] (In the robing room)

THE COURT: Are there any open or pending matters we ought to take up before the panel is brought up?

MR. CHISHOLM: I have one, your Honor. The defendant Ford previously filed a motion to dismiss for lack of speedy trial which your Honor has ruled on some months back and I just want to renew that motion to bring it up to date, to give him the maximum number of days.

THE COURT: Do you want to refresh my recollection as to the grounds of that motion?

MR. CHISOLM: The defendant was indicted back in—

THE COURT: April 3rd, 1974.

MR. CHISOLM: And the case had been continued from time to time and then of course there was a former judge on the matter and it was reassigned to you, as I recall some of the background.

At any rate, there was a hearing before you—I have the dates in my file—but a hearing before you some number of months ago on the motion to dismiss for lack of speedy trial and you denied it and I just wanted at this time to renew it.

THE COURT: Do you recall what your grounds [3] for the motion were? If not, we can take it up later.

MR. CHISOLM: I don't want to leave anything out. It's really the length of time, in essence. There are other reasons about him being denied furlough rights which he would have—he is presently serving a sentence in a Massachusetts institution and he would have certain rights if he didn't have to go to trial here.

THE COURT: Suppose we go over that after. I will look at it again after the jury selection and during the lunch hour.

MR. CHISOLM: This just incorporates the former motion. On November 4, 1974, your Honor, you denied the motion to dismiss for denial of speedy trial.

• • • •

[186] THE COURT: Mr. Chisolm, yesterday, at the commencement of the trial, you handed up a motion to dismiss the indictment for lack of speedy trial, on which I postponed decision, do you recall that, until I could look over the motion and refresh my recollection as to what had previously transpired.

I have done that now and the motion is denied and I have written an order on the face of the motion.

We will recess now for a few minutes.

(Recess)

• • • •

[657] JOSEPH B. HENDERSON, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUCHWALD:

Q Mr. Henderson, by whom are you employed, sir?
A The Federal Bureau of Investigation.
Q In what capacity?
A I am a special agent.
Q Where are you based?
A I'm currently assigned to the Chicago division.
Q Were you in the Chicago division in 1973?
A I was.
Q Let me direct your attention, if I might, to October 11, 1973. Were you on duty on that day?
A I was.
Q On that day, did you go to a certain apartment building in Chicago?
A I did.
Q Do you remember the street address of the apartment building?
A I believe it is 516 West Melrose in Chicago.
[658] Q Chicago, Illinois?
A Yes.
Q How many other agents from the FBI office were with you?
A Six other agents, I believe.
Q What did you do when you arrived at 516 West Melrose?
A I displayed some photographs of Richard Thomson Ford, and determined that he was living on the fifth floor of the apartment at that address.
Q Then what did you do?
A I moved toward the rear portion of the building while other agents remained in the front and two agents went up to the fifth floor of that building.
Q Then what, if anything, happened?
A One of the agents who had been sent upstairs came down the stairs and had a short conversation with me and then returned back upstairs.

I then moved to the rear of the building, in the parking lot, looked up toward the fifth floor and saw Richard Thomson Ford hanging by a rope between the fifth and the fourth floor of the building.
[659] Q How far up is the fifth floor from the ground where you were?
A I would estimate 40 to 50 feet.
Q How long was this rope? Was it coming out of a window?
A It was protruding out of a window.
Q How far out of the window did it come down?
A I would estimate perhaps 15 feet of the ground. 15 to 20 feet of the ground.
Q So it didn't get all the way down to the ground?
A No, it didn't come all the way down.
Q How far down had Mr. Ford—withdrawn.
How far down had Mr. Ford proceeded?
A He was sort of between the two floors, completely out of the window, say four, five feet below the window.
Q What, if anything, did you do at that time?
A I identified myself to him as an FBI agent and ordered him to come down the rope.
Q Did he do so?
A Eventually, yes.
Q Were there other FBI agents were you who joined you?
A Yes, sir, at approximately the same time other agents came back to that area and assisted as we brought [660] him down the rope, got him off the rope.
Q Then what, if anything, occurred?
A He was placed under arrest, searched briefly, patted down, handcuffed and transported to our office in Chicago.

• • • •

[670] JOHN J. LOUGHNEY, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUCHWALD:

Q How do you pronounce your last name again, sir?
A Loughney.
Q Mr. Loughney, by whom are you employed?
A By the FBI.
Q In what capacity, sir?
A Special agent.
Q Where was your office?
A I work in the Chicago office.
Q Were you working in the Chicago office in October of 1973?
A Yes, I was.
Q On October 11th of 1973 did you have occasion to go to premises at 516 West Melrose in Chicago, Illinois?
A Yes, I did.
Q Were you with other agents at that time?
A Yes.
Q Would you describe to the ladies and gentlemen of the jury what you did and what you observed on that occasion?
A Yes. On that date—
[671] Q Let me ask you to speak slowly and keep your voice up, please.
A On that date I was conducting an investigation to locate and apprehend Richard Thomson Ford. I conducted an investigation at that address and determined that Ford was living there in a fifth floor apartment under the name of John August.
Q Had you brought certain photographs with you?
A Yes, I did.
Q Let me show you the photograph, which is part of Government Exhibit 105. Is this the photograph or a blow-up of this photograph that you brought with you?
A Yes. Yes, it is.

Q After determining that the individual depicted in this photograph lived in what apartment?
A I believe it was 507. It was a fifth floor apartment in that building and I observed the bells and mailbox in the lobby of the apartment and it stated that John August lived in the apartment and that he was also the manager of the building.
Q What did you do?
A Well, I stationed agents in the front and back and also two agents on the fifth floor.
A short time later one of the agents on the fifth [672] floor came down. I spoke to him briefly and he returned to the fifth floor.
I then went to the rear parking lot and I looked up and I observed Ford on a rope. The rope was coming out of a fifth floor window.
Q The gentleman you have referred to as Ford, do you see that person in the courtroom today?
A Yes.
Q Would you point to him, please.
A He is sitting there in the gray suit at the defense table with the mustache.
THE COURT: Can't hear you, keep your voice up.
A Yes, he is at the defense table with the gray suit and the mustache.
MR. BUCHWALD: May the record reflect, your Honor, the identification of the defendant?
THE COURT: Yes.
Q Where was he when you observed him?
A When I looked up he was I would say, between the fourth and fifth floor on the rope.
Q What was he doing on the rope?
A Attempting to climb down.
Q And then what happened?
A I identified myself and ordered him to proceed
[673] down the rope.
Q Were there other agents with you at this time?

A Yes, at that time approximately four other agents were at that scene.

Q After you finally got him to the ground level, what, if anything, did you do?

A I placed him under arrest, searched him.

Q Were you one of the agents who proceeded back to the office with Mr. Ford?

A Yes, I was.

Q Did there come a time when through your search of Mr. Ford you found various items on his person?

A Yes. Back at the Chicago office of the FBI we went through the contents of his pockets and his wallet and we found several items of identification in the name of John August.

• • • •

[678] CROSS-EXAMINATION

BY MR. CHISOLM:

Q Agent Loughney, when you went to the premises on West Melrose Street on October 11, 1973, you went there to arrest Mr. August or Mr. Ford?

A Yes, sir.

Q And there was a warrant outstanding for unlawful flight to avoid prosecution from Massachusetts issued in 1969 for escape, isn't that true?

A The warrant was unlawful flight to avoid confinement, for escape and assault with intent to commit murder.

Q That was issued in 1969?

A I am not sure of the date of the issuance.

• • • •

[680] REDIRECT EXAMINATION

BY MR. BUCHWALD

• • • •

[681] Q Now, I believe you indicated in response to a question from Mr. Chisolm that at the time of the arrest

you had with you a warrant for unlawful flight to avoid prosecution. Would you explain to the ladies and gentlemen of the jury what unlawful—whether the underlying offense for the flight is a state offense or a federal offense?

A Yes. The underlying offense in this case escape and assault with intent to commit murder are state charges.

A federal warrant was issued for the unlawful flight.

[682] Q When someone crossed the state line?

A Right.

Q Was there also at that time a second warrant?

A Yes, there was. There was a bank robbery warrant out of New York for Ford's arrest.

Q That was for this case?

A Yes.

• • • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 336

UNITED STATES OF AMERICA

vs.

RICHARD THOMSON FORD, DEFENDANT

Before; HON. CONSTANCE BAKER MOTLEY, District Judge.

New York, October 14, 1975;
9:30 o'clock a.m.

(Room 1106)

APPEARANCES:

PAUL J. CURRAN, Esq.,
United States Attorney for the
Southern District of New York;

BY: DON BUCHWALD, Esq.,
Assistant United States Attorney.

RONALD CHISHOLM, Esq.,
Attorney for the Defendant.

---

* * * *

[5] MR. CHISHOLM: The presentence report, he went as far as the eighth grade in public school but it is my understanding that since his recent incarceration in State-Prison in Massachusetts that he has completed an high school education or equivalency and has a high school diploma and has gone as far as one year in obtaining

one year's college [6] credits under his present incarceration.

* * * *

[10] THE COURT: When did he earn the high school equivalency diploma?

MR. CHISHOLM: That was since he has been in jail in the State Prison in Massachusetts.

THE COURT: Since last year?

MR. CHISHOLM: It is my understanding, your Honor.

(Pause.)

MR. CHISHOLM: After he was returned to Massachusetts, after being arrested in Chicago as your Honor heard by FBI agents in 1973, he was returned to Massachusetts and he earned it at that time while in custody, while in prison.

* * * *

[15] THE COURT:* * * As the result apparently you turned to a life of crime as a result of that. However, there are indications that given the opportunity for training and time for reflection upon the way in which you might change the direction of your life, there is some hope for you that after serving your present term you will be able to redirect your life in a more constructive fashion.

The Court is impressed with the fact that despite your serious criminal record, you have taken advantage of an opportunity offered to you in the prison at Massachusetts to earn a high school equivalency diploma and you are apparently continuing to take courses beyond that.

It seems to me that a prison sentence in your case beyond ten years might operate to deprive you of the will to continue your efforts to improve yourself personally and redirect your life in a more constructive way.

As I have indicated, there is this hope that you continue service in the Massachusetts prison, when you [16] come out of prison you might have the necessary skills to find employment in an occupation which will enable you to earn a living and not have to resort to criminal activity in order to survive.

With that in mind, the Court here will sentence you to a term of imprisonment to run concurrently with the sentence imposed in Massachusetts, and the reason for that, Mr. Ford, is, as I have indicated, is because it seems to me that a sentence to run more than ten years might have an effect not intended by the Criminal Justice system and that is, as I have indicated, its effect might be to deprive you altogether of the will to change the way in which you have lived.

So with respect to the first count the sentence imposed is a sentence of five years. With respect to the second count, the sentence is five years; with respect to the third count, the sentence is five years, and with respect to the fourth count, the sentence is five years.

Now, each of those sentences are to run concurrently with each other and concurrently with the sentence of eight to ten years imposed in Massachusetts.

• • • •

SUPREME COURT OF THE UNITED STATES

No. 77-52

UNITED STATES, PETITIONER

v.

RICHARD THOMPSON FORD

ORDER ALLOWING CERTIORARI. Filed October 3, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is set for argument in tandem with No. 76-1596.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 250061 90

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

-v.-

RICHARD T. FORD,

Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Respondent, Richard T. Ford, respectfully seeks leave to proceed here in forma pauperis, and to file a typewritten brief in opposition to the petition for certiorari. Counsel's affidavit in support of this application is annexed.

David J. Gottlieb

PHYLIS SKLOOT BAMBERGER,
WILLIAM E. HELLERSTEIN,
Attorneys for Respondent
RICHARD T. FORD
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New York, New York 10007
(212) 732-2971

DAVID J. GOTTLIEB,

Of Counsel.

New York, New York
September 2, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

-v.-

RICHARD T. FORD,

Respondent.

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID J. GOTTLIEB, being duly sworn, deposes and says:

I am an attorney associated with The Legal Aid Society, Federal Defender Services Unit. I am the attorney who prepared the brief and argued the appeal on behalf of respondent Richard T. Ford before the United States Court of Appeals for the Second Circuit.

On appeal, respondent Ford was represented by counsel from The Legal Aid Society, Federal Defender Services Unit, assigned by the Court of Appeals for the Second Circuit pursuant to the Criminal Justice Act.

On August 12, 1977, respondent Ford was released on recognizance in connection with his sentence in this case pending the resolution of his case before this Court. The next day he was released on parole from the Massachusetts State Correctional Institution in which he was serving his federal and state sentences. While Mr. Ford is presently employed, it is at the same job he held while in a work-release program, and his parole release requires him to pay for numerous living expenses which he was not required to pay for while incarcerated. Thus, I am aware of no favorable changes in his circumstances which would suggest he is now more capable of retaining counsel to represent him in this proceeding than in the Court of Appeals, and I believe he is without sufficient funds to retain counsel or to pay the costs connected with this petition.

WHEREFORE, it is respectfully prayed that respondent Richard T. Ford be permitted to proceed here *in forma pauperis*, and file a typewritten brief in opposition to the petition for certiorari.

David J. Gottlieb

DAVID J. GOTTLIEB

Sworn to before me this
 day of September 1977.

Notary Public

JONATHAN J. SILBERMANN
NOTARY PUBLIC, State of New York

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

-v.-

RICHARD T. FORD,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHYLIS SKLOOT BAMBERGER,
WILLIAM E. HELLERSTEIN,
Attorneys for Respondent
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DAVID J. GOTTLIEB,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

-v.-

RICHARD T. FORD,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit included as Appendix A to the petitioner's appendix is reported at 550 F.2d 732.

QUESTIONS PRESENTED

1. Whether there is any conflict in the circuits or uncertainty on the issue presented by this case.

2. Whether, when the federal government lodges a detainer against a state prisoner, the subsequent production of that

prisoner for temporary federal custody for trial in federal court by a means of a writ of habeas corpus ad prosequendum invokes Article IV of the Interstate Agreement on Detainers.

3. Whether this Court should review the conclusion of the court below that, on the facts of the case, respondent did not waive his claim under Article IV of the Interstate Agreement on Detainers.

STATEMENT OF THE CASE

After lodging a detainer against respondent in Massachusetts, where he was then incarcerated, the Government produced respondent for trial in the Southern District of New York via a writ of habeas corpus ad prosequendum in March, 1974. Despite his frequent requests for a prompt trial, he was not tried until September, 1975, some 17 months later, with the detainer outstanding against him the entire time. The Interstate Agreement on Detainers having been invoked by the Government's filing of a detainer and subsequent obtaining of custody of respondent, and because the requirement of Article IV(c) of the Agreement that trial be held in 120 days was violated, the Court below reversed the judgment of conviction.

On October 11, 1973, respondent Richard T. Ford was arrested in Chicago, Illinois, by the FBI on warrants charging him with bank robbery and interstate flight to avoid prosecution. The interstate flight warrant was dismissed but respondent was held by Chicago authorities for extradition to Massachusetts to face pending state charges (PA 2a; 550 F.2d at 735).* While incarcerated in Chicago respondent submitted a letter to the United States Attorney for the Southern District of New York and to the United States District Court for the Southern District of New York

*Numerals and letters preceded by "PA" are references to pages of petitioner's appendix. References to "RA" refer to Respondent Ford's appendix in the Court of Appeals.

requesting a prompt trial on the federal charges (See PA 22a, 550 F.2d at 742; RA "D"). Before receiving a response, respondent was extradited to Massachusetts to stand trial on the state charge, and the federal warrant issued by the Southern District of New York charging him with bank robbery was lodged as a detainer. On February 8, 1974, respondent pleaded guilty to the Massachusetts charges and was sentenced to concurrent terms of eight to ten years' imprisonment (PA 2a-3a, 550 F.2d at 735).

On March 21, 1974, a two-count indictment charging respondent with bank robbery was filed in the Southern District and on March 24, a writ of habeas corpus ad prosequendum was issued to obtain custody of respondent for arraignment and until he was "discharged or convicted and sentenced on said indictment." (RA "B", "H"). On April 1, 1974, appellant was arraigned, and that same day the Government filed a notice of readiness. Two days later, the present superceding indictment was filed, charging respondent and one James T. Flynn with bank robbery and other crimes. On April 11, 1974, respondent pleaded not guilty to the indictment and a warrant was issued against Flynn who failed to appear. A trial date was set for May 28, 1974 (PA 3a, 550 F.2d at 735). The Government requested that the trial not begin until that date, inter alia, in order to give it the opportunity to locate co-defendant Flynn (Transcript of April 25, 1974, at 16-18).

On May 17, 1974, shortly before the scheduled trial date, the Government requested the first of what was to become a long series of delays, moving to adjourn the trial for 90 days or until the co-defendant was apprehended, whichever came first, and supporting its request by a sealed affidavit. Noting respondent's previous request for a speedy trial, the defense objected to the delay and informed the Court that the federal detainer lodged against respondent in Massachusetts was impairing his eligibility for furlough and work release programs.

Nevertheless, the Government's motion was granted, and a trial date was set for August 21, 1974. Following the granting of the motion, respondent was removed from federal custody and transferred back to Massachusetts (PA 3A, 550 F.2d at 735; Transcript of May 22, 1974).

In August, 1974, the case was reassigned to a different district judge, the original judge having resigned from the bench. Without informing the defense in advance of its decision or permitting it to be present, the Court, without explanation, postponed the trial date until November 18. On November 1, the Government yet again moved for a 90-day adjournment within which to apprehend respondent's co-defendant, and again supported its motion by sealed affidavit. The defense objected to the request and further moved to dismiss the indictment on the ground that respondent had been denied a speedy trial, again alleging that he was being prejudiced, inter alia, by denial of rehabilitative privileges due to the federal detainer (RA "D"). The Court denied the defense motion and granted the Government's request for an adjournment.

On the scheduled trial date, the district judge was engaged in a stock fraud trial. Although the Second Circuit had recently emphasized that calendar delay was no excuse for postponing a criminal trial and that in such cases the action should be assigned to a different judge (United States v. Drummond, 511 F.2d 1049, 1053 (2d Cir.), cert. denied, 423 U.S. 844 (1975)), the district judge instead again postponed the trial over defense objection, until June 11, 1975. In the following month, the Southern District announced a crash program for civil cases. When the Assistant United States Attorney inquired whether this would affect the date of respondent's trial, the district judge sua sponte set a new trial date, and only subsequently notified the defense which again futilely protested the delay (PA 4a, 550 F.2d at 735-736; RA "E").

On August 8, 1975, the Government obtained respondent for trial by means of a second writ of habeas corpus ad prosequendum (RA "I"). The trial began on September 2, 1975. On that day, respondent again moved for dismissal for failure to provide a speedy trial. The motion was denied, and respondent was subsequently convicted of all counts. The district judge sentenced respondent to concurrent five year terms, with the recommendation that the terms be allowed to run concurrently with the Massachusetts state sentence respondent was already serving* (PA 4a-5a, 550 F.2d at 736).

On appeal to the Second Circuit, respondent argued that the delay in bringing him to trial violated the Southern District Plan for prompt disposition of criminal cases, the Sixth Amendment, and Articles IV(c) and IV(e) (the speedy trial and transfer provisions) of the Interstate Agreement on Detainers. On February 3, 1977, the Court of Appeals reversed. Without reaching respondent's Sixth Amendment or Speedy Trial rule claims, the Court of Appeals found a failure to comply with Article IV(c) of the Interstate Agreement on Detainers, which mandates that trial be commenced within 120 days of receipt of the prisoner unless continuances are granted for good cause in open court, and accordingly ordered dismissal of the indictment.

After a review of the history and purposes underlying the enactment of the Interstate Agreement on Detainers, aptly characterized by the dissenting judge as a "most learned and exhaustive treatise" (PA 26a, 550 F.2d at 744), the Court concluded that where the federal government has actually filed a detainer against a state prisoner, it invokes Article IV of the Interstate Agreement on Detainers by production of the prisoner for

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*On August 13, 1977, respondent was released on parole on his state sentence. The preceeding day, he was released from federal custody on his own recognizance pending the disposition of this case after having served some 20 months of the sentence concurrently with the Massachusetts sentence.

trial by means of a writ of habeas corpus ad prosequendum. The Court noted that to hold otherwise would vitiate operation of the Agreement "insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ. This, in turn, would impair the operation of the agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (PA 20a, 550 F.2d at 742). In reaching this narrow conclusion Judge Mansfield carefully distinguished this case from the circuit's then recent opinion of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), petition for cert. pending, Sup.Ct. Doc. No. 76-1596, which held the sanctions of the agreement applicable where no detainer was filed but where "the sole federal intervention is the issuance of a habeas writ" (PA 19a, 550 F.2d at 741).

After concluding that the agreement applied, the Court first rejected respondent Ford's claim that his transfer back to Massachusetts prior to trial violated Article IV(e) of the agreement, which mandates that a defendant be tried before being returned to his original jurisdiction, holding that respondent had requested to be returned to Massachusetts and that such request waived his claim under Article IV(e). Turning to Article IV(c) which requires that trial be held within 120 days, except for reasonable continuances granted in open court, the panel found that respondent had not waived this claim, and that on the contrary, he had from the outset repeatedly insisted upon a prompt trial. The majority then determined that a number of the continuances were unjustifiable, in addition to having been decided upon outside of the respondent's presence (PA 21a-26a, 550 F.2d at 742-744). Accordingly, the Court ordered dismissal of the indictment. In dissent, Judge Moore took no issue with the majority's conclusion that the Agreement on Detainers applied but disagreed with the majority's conclusion that the continuances were unnecessary and unreasonable (PA 28a-29a, 550 F.2d at 744-745).

REASONS FOR DENYING THE WRIT

I

THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE PRESENTED BY THIS CASE. ACCORDINGLY, THERE SHOULD BE NO "UNCERTAINTY" CAUSED BY THE COURT'S OPINION.

In its effort to convince the Court of the importance of this case, the Government attempts to link the narrow holding of the Court below with the Second Circuit's opinion in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), petition for cert. pending, Sup.Ct. Doc. No. 76-1596. This effort is ill-conceived. Mauro involves the question of whether the Government is bound by Article IV of the Interstate Agreement on Detainers when it obtains a prisoner from another jurisdiction by a writ of habeas corpus ad prosequendum where no previous detainer against the prisoner has been filed by the Government, i.e., whether the Government writ in itself constitutes a "detainer" as well as a request for custody. The Mauro conclusion that a habeas writ is a detainer has divided the circuits. Compare United States v. Mauro, supra, and United States v. Sorrell, No. 76-1647 (3rd Cir. August 22, 1977)(en banc) with United States v. Kenaan, ____ F.2d ____, No. 77-1014 (1st Cir. July 7, 1977), petition for cert. pending, Sup.Ct. Doc. No. 77-206; United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977), petition for cert. pending, Sup.Ct. Doc. No. 76-6559; Ridgeway v. United States, ____ F.2d ____, No. 76-2145 (6th Cir. July 13, 1977), petition for cert. pending, Sup.Ct. Doc. No. 77-5252.

In contrast, this case presents a question not only more limited than that in Mauro, but one which has produced no conflict among the circuits: Where the Government has actually filed a detainer, thus burdening the defendant with the very disabilities which were the reasons for enacting the Interstate Agreement on Detainers, and the Government thereafter obtains

custody of the defendant, may it nevertheless avoid the Agreement because its custody request is denoted a writ of habeas corpus ad prosequendum rather than some other name. After an exhaustive opinion, the Court below held that the Agreement applied. The Court's opinion, in accord with the language of the statute and other federal decisions, is hardly as novel as the Government suggests. Indeed, the Government petition in effect concedes that had any state which was a party to the Agreement followed the actions engaged in by the Government, there is no doubt they would have been held bound by the Agreement. More importantly, unlike Mauro, the Ford decision concerns an issue which has engendered no split in authority among the circuits. In fact, the very cases which conflict with Mauro affirm the validity of the Ford opinion. Thus, in United States v. Kenaan, supra, while the First Circuit rejected the view that a writ of habeas corpus constituted a detainer under the agreement, it explicitly, albeit in dicta, approved of the result in Ford:

> "Were we required to decide the question, we would, on this record, conclude that the United States participates as both a sending and receiving state and that when it lodges a detainer, as it did in Cyphers, Ford and Sorrell...the United States must comply with the agreement."
>
> Slip op. at 5 n.6.

To similar effect, the Fifth Circuit in United States v. Scallion, supra, distinguished the case before it, where no detainer was lodged, with the case where the Government actually lodges a detainer:

> The Government also argues that when Congress enacted the Act it intended to cast the United States in the role of a "Sending State" and not a "Receiving State" under the Agreement in recognition of the existing power to obtain custody of state prisoners by the use of the writ of habeas corpus ad prosequendum. We are unable to detect such intent. Article II provides that "State" as used in the Agreement includes the United States of America. To the extent that the United States makes use of a detainer, it is a "Receiving State" subject to the terms of the Agreement.
>
> 548 F.2d at 1174 (emphasis supplied).

Accord, United States v. Cyphers, 556 F.2d 630 (2d Cir. 1977), petition for cert. pending, sub. nom United States v. Ferro, No. 77-326; United States v. Sorrell, supra. See also, United States v. Ricketson, 498 F.2d 367, 373 (7th Cir.), cert. denied, 419 U.S. 965 (1974)(court "assume[s]", without deciding question, that habeas writ is a request under Article IV but rejects defendant's challenge that Agreement applies when custody obtained "before any detainer was filed").

In light of the complete lack of dispute among the federal courts considering the issue, there is simply no reason for federal prosecutors to be left "profoundly uncertain" about whether when the Government actually files a detainer, and subsequently obtains a state prisoner for trial by a writ of habeas corpus, it is subject to Article IV of the Interstate Agreement on Detainers. A number of circuits have spoken on the issue, all adhere to the result in Ford. There is no split, or hint of one, in the circuits. While the Justice Department may disapprove the result reached, there is no uncertainty about the language as enacted by Congress or the application of the statute by the courts.

II

THE DECISION OF THE COURT BELOW WAS ENTIRELY CORRECT.

The essence of the Government's principal position is that the Agreement was enacted by Congress primarily to give the states a practical method of obtaining federal prisoner, thus helping to assure that the states would comply with the speedy trial requirements of Smith v. Hooey, 393 U.S. 374 (1969). The Government insists that there is no benefit to federal prosecutors

and that in light of this lack of benefit, as well as subsequent legislation, and the language of several provisions of Article IV, there is "severe doubt that Congress intended to subject federal prosecutions maintained with the aid of writs of habeas corpus ad prosequendum to the terms of the Agreement." As the exhaustive and learned opinion of the Court below demonstrates, petitioner's attempt to disengage itself from the Agreement misreads the history of the Interstate Agreement on Detainers and ignores the plain language of the Agreement.

A.

Contrary to the Government's view, the Interstate Agreement on Detainers as a whole, and Article IV in particular, was not designed for the sole purpose of aiding state officials to provide speedy trials. Rather, it was designed to remedy a multiplicity of problems present in both state and federal jurisdictions caused by the extensive but unregulated use of detainers. Under the system prior to adoption of the Act, once a jurisdiction had convicted an accused, another jurisdiction, rather than trying him for charges pending there, would merely file a detainer at the place of custody in the first jurisdiction notifying the prison authorities of the pending charges. The disadvantages of the unregulated system were felt by prison administrators, prosecutors, and defendants alike. The existence of detainers adversely affected the terms and conditions of a prisoner's confinement often rending him ineligible for furloughs, minimum custody, or even parole, without any recourse on the prisoner's part to change them. The pendancy of a detainer hampered prison administrators, state and federal, in developing coherent rehabilitation programs and created difficulties for federal and state judges in sentencing. These uncertanties in turn affected the prisoner's ability to rehabilitate himself, A host of different problems were encountered by the inmate when he eventually had to

prepare for trial, often far from witnesses or evidence. Finally, extradition rules were confusing and cumbersome at best (See PA 9a-17a, 550 P.2d at 737-740).

It was to remedy all these problems that the Interstate Agreement on Detainers was written and it was with recognition by Congress of the fact that these problems were affecting the federal as well as state governments that the Congress voted to make the United States a party to the Agreement. See S. Rep. No. 91-1356, 3 U.S. Code Cong. and Admin. News at 4865-4867 (1970); 116 Cong. Rec. 13999 (Remarks of Congressman Kastenmeier).

The Agreement provides a comprehensive scheme for disposing of detainers, a scheme which is, by its own terms, fully applicable to the United States, since the United States is defined in Article II of the Agreement as a "state" under the Agreement. Article III of the Agreement provides a procedure whereby the prisoner may demand trial when there is a pending charge "on the basis of which a detainer has been lodged against the prisoner" (Article III(a)). Article IV provides the means by which the prosecutor may, by filing a request for custody, summon for trial a prisoner "against whom he has lodged a detainer and who is serving a term of imprisonment in any party state..." The two principal qualifications for the state making use of the procedure are the requirements that trial be held within 120 days of receipt of custody with allowance for reasonable continuances and that the inmate not be returned to his original jurisdiction until after trial is completed. While one of the purposes of Article IV is to simplify transfers between the various states, contrary to the Government's view it is not the sole purpose. The Article is also designed to insure both prisoners and the states that outstanding detainers will be disposed, and that charges will be expeditiously resolved, a consideration which applies where the federal Government obtains a prisoner, as well as when the state obtains a prisoner. Furthermore, Article IV is

a necessary complement to the provisions of Article III, by which a prisoner may demand trial:

> In part the limitations imposed by Article IV constitute necessary corollaries to those imposed by Article III, since without the Article IV limitations prosecutors would be able to avoid the limitations under Article III merely by arraigning the prisoner without any intention of granting a prompt trial, thereby circumventing the requirements of the Agreement.
>
> PA 18a, 550 F.2d at 741.

Thus, the history and purposes of the Agreement provide absolutely no support for the view that the federal government should not be bound by Article IV when it invokes the Agreement by filing a detainer and thereafter obtains custody of the prisoner. However, any doubt on this score is removed by reference to the literal terms of the Agreement, which states that "[t]his agreement shall enter into full force and effect as to a party State when such State has enacted the same into law" (Article VIII), and further provides that "[t]his agreement shall be liberally construed so as to effectuate its purposes" (Article IX).

Obviously, a holding that the Government is not bound by Article IV, even when it files a detainer, only because it denotes its custody request a writ of habeas corpus ad prosequendum rather than something else, would completely frustrate the Agreement as respects federal detainers since most transfers occur pursuant to the writ. Moreover, it would, as the Court below noted, impair operation of the Agreement as an attempt to solve a nation-wide problem since federal detainers form a large percentage of all detainers outstanding (PA 20a-21a, 550 F.2d at 742). There is simply no support for the Government's attempt at a judicial repeal of an integral part of the Agreement on Detainers. It is also notable that the Government provides no reason why this Court should engage in such a drastic procedure. All states who are parties to the Agreement have managed to follow the limited conditions imposed in Article IV without problems. There is absolutely no reason to exempt the federal government.

B.

The Government next points to language in Article IV(a) which, it submits, indicates that the Article as a whole does not apply to the Government when it seeks custody of a prisoner by means of a habeas writ. The particular portion of Article IV(a) upon which the Government focuses is that there be a 30-day waiting period within which the Governor of a state may deny a custody request. The Government claims this language is inconsistent with the terms of a habeas writ, which are mandatory. In the first instance, it is not settled that a habeas writ is mandatory, since "the jurisdiction to which such writ is addressed is relied upon to cooperate in turning over the defendant to the other sovereign." United States v. Mauro, supra, 544 F.2d at 592; United States v. Oliver, 523 F.2d 253, 258 (2d Cir. 1975); Comment, 31 U. Chi. L. Rev. 535, 541 (1964). See also, Carbo v. United States, 364 U.S. 611 (1961).

However, even if the writ is mandatory, there is no conflict between the writ and the Agreement. As the Court below noted, the 30-day provision of Article IV(a) was not designed to change existing law, but merely to preserve any existing right to refuse extradition which might have been possessed by officials prior to the Agreement. There should be therefore no real conflict between the Article and the writ if in fact prior to the statute there was no right to refuse the writ.

Thus, any conflict at all between Article IV(a) and the habeas writ is at most a hypothetical conflict in language and there is no reason to fail to apply the Agreement where the Government has proceeded by filing a detainer and where in fact the Governor has complied with the terms of the writ. As the Court below noted:

> Thus, we are asked to take a hypothetical and possibly non-existent conflict between a minor provision of the Act which relates to transfer mechanics and prior federal law and use it as the touchstone for an interpretation which would vitiate its operation as it affects federal detainers...
>
> (PA 20a, 550 F.2d at 742)(citations omitted).

As the Court concluded, to adopt such a position would be to stand the Agreement on its head.

C.

Even further afield is the Government's argument that the enactment of the Speedy Trial Act four years after Congress joined the Agreement on Detainers indicates a lack of intent on Congress' part to have subjected the Government to Article IV of the Agreement. The weakness of this claim is admitted at the outset by the Government, which recognizes that the enactments of a later Congress are hardly determinative of the intent of an earlier Congress. Pet. for cert. at 18; cf. United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Wise, 370 U.S. 405 (1962). In any event, the provisions of the Speedy Trial Act not only do not conflict with the Agreement, but read with the Agreement form a complimentary unit.

Thus, because the Agreement applies only where the Government files a "detainer," it was incomplete because it did not require a party state which did not file a detainer to notify the prisoner of outstanding charges. See Note, 77 Yale L.J. 767, 775 (1968). What Congress did in part of the Speedy Trial Act (18 U.S.C. §3161(j)(1)) was to close this "loophole" and require the federal government, when it has an outstanding charge, either to procure the prisoner or to notify him of the pending charge by filing a detainer. This notification, in the case of a transfer between party states to the Agreement would then, of course, bring the Agreement into play. Moreover, contrary to the Government's view, the Speedy Trial Act recognizes the existence of compacts such as the Interstate Agreement and specifically disclaims any intent of changing existing law in that regard. Thus, the Legialative Report on the Act states, with reference to another section of the Speedy Trial Act, 18 U.S.C. §3161(j)(4):

> In preserving the defendant's right to challenge the legality of his being surrendered by the custodial authority, the Committee does not intend in any way to change existing law with respect to extradition or transfer of and responsibility for custody in cases where more than one jurisdiction is involved.
>
> H. Rep. No. 93-1508 93rd Cong. 2d Sess. at 36 (emphasis supplied).

Finally, there is nothing inconsistent about the fact that the time limits or conditions in the Speedy Trial Act may differ from those in the Interstate Agreement on Detainers. Quite simply, the two are different pieces of legislation with different procedures because of the variance in purpose and participants. The time limits in the Interstate Agreement apply to a particular class of cases in a number of jurisdictions which have voluntarily agreed to become parties to the Agreement. If the United States wishes to set different time limits for its criminal cases, it is, of course, free to do so, but that fact hardly constitutes a repeal of the limits contained in the Interstate Agreement which the United States has adopted by becoming a party.

D.

The Government's claim that respondent was not prejudiced by the Government's violation of the Agreement -- the long 17 month delay between the indictment and his trial -- is flatly incorrect. In the district court's final sentence, it was recommended that appellant's sentence be served concurrently with a sentence he was serving in Massachusetts, a sentence imposed before the indictment in this case. Thus, every day's delay in respondent's trial deprived him of an opportunity for a day's concurrent sentence. Respon-

dent will be substantially prejudiced by the delay in the event of reversal of the conviction since, on August 13, 1977, he was released on state parole with much of his federal sentence left to serve. See generally Smith v. Hooey, 393 U.S. 374 (1969).

III

THE COURT SHOULD NOT REVIEW THE CONCLUSION OF THE COURT BELOW THAT, ON THE FACTS OF THIS CASE, APPELLANT DID NOT WAIVE HIS CLAIM UNDER ARTICLE IV(c) OF THE AGREEMENT.

The Government argues that respondent irrevocably waived his speedy trial claim under the Agreement by his failure to denote his speedy trial objection as including a claim under Article IV(c) of the Agreement. We submit that on the particular facts of this case, the Court below correctly found otherwise, and that in any event, the application of waiver principles to a particular claim under the Agreement does not at this point present an important question of federal law meriting Supreme Court review.

It is notable that before determining appellant's claim under Article IV(c) of the Agreement the Court of Appeals concluded that respondent, by his request to be returned to Massachusetts, had waived any claim he might have under Article IV(e). However, the court correctly noted that while respondent, by this action, might have waived his right to a transfer, he did not waive any right to a speedy trial. In fact, respondent, from the time of his arrest had sent a letter to the Assistant United States Attorney requesting a trial as expeditiously as possible. He objected to every continuance that was granted at an in-court proceeding at which he was present and twice moved for dismissal of the indictment. Given respondent's repeated requests for a speedy trial, it is small wonder that the Court failed to find a knowing and intelligent waiver of the speedy trial provision of the Agreement merely by his failure to assert the particular provisions of the Agreement prior to trial.* Indeed, a finding of waiver would have been particularly inappropriate in light of the fact that two of the continuances in this case were ex parte, with the defendant neither present nor afforded the opportunity to object to the Court's actions.

The refusal to find a waiver merely on the basis of failure to assert the claim prior to trial is in accord with the language of the Agreement, and the decided cases on this issue. Thus, unlike provisions such as the Southern District Speedy Trial Rules, the Agreement has no specific requirement that the defendant initiate objection if he is not tried in accord with the time limits set forth in Article IV. Rather, the Agreement commands that in the event the agreement is violated, the Court "shall enter an order" dismissing the indictment with prejudice (Article V(c)). It is mandatory on the happening of the delay and includes no requirement that defense counsel advise the Court and the Government on the law.

As the Second Circuit also recognized in United States v. Cyphers, supra, Rule 12 of the Federal Rules of Criminal Procedure which mandates that certain motions be raised prior to trial or be thereafter waived, is simply inapplicable to claims under the Agreement. 556 F.2d at 634. And, while the Agreement might itself have provided that failure to assert the claim before trial was a waiver of the claim, the Agreement does not so provide.

The still-evolving interpretation employed by the Second

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*That such questions of waiver turn upon the facts of each individual case is illustrated by the circuit's ensuing decision of United States v. Cyphers, supra. In Cyphers, the Court specifically rejected the Government's argument that the failure to raise the detainer claim before trial per se constituted a waiver under Rule 12(f) of the Federal Rules of Criminal Procedure. Noting that in Cyphers there was no evidence that the defendant even knew that a detainer had been lodged against him, the Court held that the defendant might invoke the Agreement for the first time on appeal.

and other Circuits and exemplified by the instant case is not in necessary conflict with the Fifth Circuit's decision in United States v. Scallion, 548 F.2d 1158 (5th Cir. 1977). Thus, in Scallion, while the Court found a waiver of the defendant's detainer claim, the waiver occurred in circumstances where the claim under the Agreement had not only not been raised at trial, but had not been raised on appeal, or for that matter on rehearing, but on an untimely "amended petition for rehearing" filed after initial denial of the rehearing claim. In such circumstances, it is no great surprise that the panel found that "[t]o consider Scallion's unconstitutional claim at this late stage would tend to encourage piecemeal litigation of claims of error in the appellate courts and undercut the policy of achieving prompt and final judgments." 548 F.2d at 1174.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 77-52

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD T. FORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 550 F. 2d 732.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1977, and a petition for rehearing with a suggestion for rehearing *en banc* was denied on May 9, 1977. On June 6, 1977, Mr. Justice Marshall extended the time for the filing of a petition for a writ of certiorari to and including July 8, 1977. The petition was filed on that date and was granted on October 3, 1977 (A. 115). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production for trial on federal criminal charges of a state prisoner against whom a federal detainer has previously been lodged, constitutes a "written request for temporary custody" rendering applicable the terms and conditions of Article IV of the Interstate Agreement on Detainers Act.

2. Whether respondent, by failing to raise the issue in the district court, waived the claim that his indictment should have been dismissed for violation of the Interstate Agreement on Detainers Act.

STATUTE INVOLVED

The Interstate Agreement on Detainers Act, 18 U.S.C. App., pp. 4475–4478, is set forth in an appendix to this brief, *infra*.

STATEMENT

1. In November 1971 a federal bench warrant issued authorizing respondent's arrest for the October 20, 1971, robbery of the Orange County Trust Company in Middletown, New York. Respondent was not apprehended until nearly two years later, on October 11, 1973, when federal agents executing this (and one other) warrant arrested him in Chicago (A. 106–111). Shortly after his arrest, respondent was turned over to Illinois authorities for extradition to Massachusetts on older, unrelated state charges. While in the custody of the Illinois authorities, respondent

requested a speedy trial on the federal charges by separate letters sent to the United States Attorney for the Southern District of New York and the United States District Court for the Southern District of New York (A. 87–90). Upon respondent's transfer to Massachusetts, federal officials lodged the federal bank robbery warrant as a detainer with Massachusetts prison authorities (A. 51, 74).

On March 21, 1974, following respondent's conviction in Massachusetts on the state charges,[1] an indictment (74 Cr. 279) was filed in the United States District Court for the Southern District of New York charging respondent with bank robbery and aggravated bank robbery, in violation of 18 U.S.C. 2113(a) and (d). On April 1, 1974, respondent was produced from Massachusetts for arraignment before the federal district court in New York pursuant to a writ of *habeas corpus ad prosequendum* issued by the court on March 25, 1974 (A. 1, 8–9).[2] The court directed the entry of a not guilty plea on behalf of respondent, who appeared without counsel, and then adjourned the proceedings for one week to enable respondent to secure an attorney (A. 19–20).[3]

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[1] Respondent pleaded guilty to the Massachusetts charges on February 8, 1974, and was sentenced forthwith to concurrent terms of eight to ten years' imprisonment (A. 51, 74).

[2] The writ was addressed to the warden of the Massachusetts correctional facility where respondent was incarcerated and to the United States Marshals for the Southern District of New York and the District of Massachusetts.

[3] On April 1, 1974, the government filed a notice of readiness for trial with respect to Indictment 74 Cr. 279 (A. 12, 52).

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Two days later, on April 3, 1974, a superseding indictment (74 Cr. 336) was filed charging respondent and one James R. Flynn with the same bank robbery initially charged in the first indictment, and also with use of a firearm in the commission of a bank robbery, in violation of 18 U.S.C. 924(c)(1), interstate transportation of a stolen automobile, in violation of 18 U.S.C. 2312, and conspiracy to commit the above offenses, in violation of 18 U.S.C. 371 (A. 14–17). On April 15, 1974, respondent pleaded not guilty to the charges contained in the new indictment, but co-defendant Flynn failed to appear, and a bench warrant was issued for Flynn's arrest (A. 28–30).[4] Trial was thereafter scheduled for May 28, 1974.

On May 17, 1974, the government moved to adjourn the trial for a period of 90 days or until Flynn was apprehended, whichever occurred first; the motion was supported, in part, by a sealed affidavit (A. 48, 60–65). On May 22, 1974, the motion was granted by the district court, and respondent's trial was rescheduled for August 21, 1974 (A. 65).[5] Respondent subsequently sought and was granted permission to be returned to Massachusetts, where his attorney's office was located, in order to facilitate preparation for trial (A. 66). He was transferred back to the Massachusetts prison on June 14, 1977 (A. 11).

[4] The court also, upon the government's motion, directed respondent to provide handwriting and hair samples within one week or face punishment for contempt (A. 32–35). Thereafter, on April 25, 1974, the court held respondent in civil contempt for refusing to furnish the hair samples (A. 45).

[5] On granting the adjournment, the court found no prejudice to respondent in the preparation of his defense and held that the government was entitled to a reasonable interval to attempt to apprehend Flynn so that judicial resources could be conserved by having respondent and his co-defendant tried jointly (A. 63, 64).

In August 1974 the case was reassigned to a different judge (following the first judge's resignation), and trial was reset for November 18, 1974 (A. 68). On November 1, however, the government requested an additional adjournment of up to 90 days in which to apprehend Flynn (A. 71–82) and filed a second sealed affidavit in support of this motion. On November 4 respondent moved to dismiss the indictment on the ground that he had been "denied his rights to a speedy trial as guaranteed to him by the Federal Constitution and the Rules of the Southern District of New York" (A. 83–91). The supporting papers alleged that respondent was being denied furlough privileges while the federal detainer remained lodged against him (A. 86), but respondent did not invoke in his motion papers the provisions of the Interstate Agreement on Detainers Act ("Agreement") as a basis for relief.[6] The court denied the speedy trial motion, granted the government's application for adjournment, and set a new trial date of February 18, 1975 (Pet. App. 4a).

On February 18, however, the district judge was engaged in a lengthy stock fraud trial, and a new date of June 11, 1975, was set. While respondent objected to the adjournment on the basis of his earlier

[6] Nor did respondent demand final disposition of the indictment pursuant to Article III of the Agreement. See note 9, *infra*.

speedy trial motion, he did not request reassignment of the case to another judge (A. 92–94). In the following month, the district court announced a "crash" program for the disposition of civil cases, to commence on June 1. Because of this program, respondent's trial was postponed a final time, until September 2, 1975 (Pet. App. 4).

On August 8, 1975, the government secured respondent's presence for trial from Massachusetts prison authorities by means of a writ of *habeas corpus ad prosequendum* issued by the district court (A. 98–99). At the beginning of trial respondent again moved to dismiss the indictment on speedy trial grounds; the motion was denied (A. 100–105). Following a six-day trial, in which 36 witnesses testified for the government and the stipulated testimony of 12 other witnesses was read to the jury, respondent was convicted on all counts.[1] He was sentenced to concurrent terms of five years' imprisonment, which the district court recommended be served concurrently with respondent's Massachusetts sentence. At sentencing the court noted that respondent had availed himself of the opportunity to earn a high school equivalency diploma while incarcerated in Massachusetts during the preceding year (A. 112–113).

[1] Respondent has not challenged his simultaneous convictions under both 18 U.S.C. 2113(d) and 18 U.S.C. 924(c)(1). See *Simpson* v. *United States*, Nos. 76–5761 and 76–5796, argued November 1, 1977. Although the trial judge imposed concurrent sentences on those counts, a procedure prohibited by Section 924(c), the government has not sought correction of the sentence.

2. On appeal, respondent argued for the first time that his indictment should have been dismissed with prejudice because he had not been tried within 120 days after his initial arrival in the Southern District of New York and because he had been returned to state prison in Massachusetts following his arraignment without having first been tried on the federal charges, in alleged violation of Articles IV(c) and IV(e) of the Agreement. Article IV of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant serving a prison sentence in another member jurisdiction may lodge a "detainer" with the prison authority of that jurisdiction and, upon presentation of a "written request for temporary custody," obtain temporary custody of the prisoner for purposes of trial.[2] The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (except where a continuance is granted "for good cause shown in open court" in the presence of the prisoner or his counsel) and (b) prior to being returned to the sending state, or else the charges against

[2] Both the United States and Massachusetts had become signatories to the Agreement prior to the relevant events in this case. Act of December 9, 1970, Sections 1–8, 84 Stat. 1397–1403, 18 U.S.C. App., pp. 4475–4478; Mass. Gen. Laws, ch. 276, App. §§ 1–1 to 1–8 (1966).

him shall be dismissed with prejudice. Articles IV(c), IV(e), V(c).[9]

A divided panel of the court of appeals reversed the conviction and remanded the case to the district court with directions to dismiss the indictment with prejudice (Pet. App. 1a–29a). The court held that, whether or not a writ of *habeas corpus ad prosequendum* used to secure custody of a state prisoner serves as a "detainer" (see *United States* v. *Mauro*, 544 F. 2d 588 (C.A. 2), certiorari granted, No. 76–1596, October 3, 1977), "once a federal detainer has been lodged against a state prisoner, the habeas writ constitutes a 'written request for temporary custody' within the meaning of Article IV of the Detainers Act" (Pet. App. 21a). The court rejected the government's argument that the Agreement, even if it allows prisoners to clear detainers and to compel prompt disposition of pending charges against them (Article III), was not intended to affect the federal

[9] Article III of the Agreement provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III(c), prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction, and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III(a), III(d), and V(c).

government's concurrent right to obtain custody of a prisoner for trial under the power of the writ *ad prosequendum*.[10] The majority reasoned that failure to treat a writ as a "request" under the Agreement, if the writ was served after the lodging of a detainer, "would vitiate [the] operation [of the Agreement] insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ" (Pet. App. 20a). Moreover, the court stated that the government's proposed construction would "impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (*ibid.*).

After having thus concluded that the Agreement was applicable, the court then held that the provisions of Article IV(c) had been violated.[11] The majority ruled that the adjournments prior to that of February 18, 1975, were properly granted but that the subsequent adjournments neither were "for good cause" nor granted with "the defendant or his counsel being present" (Pet. App. 23a–25a). Based upon this violation of the Agreement, the court held that Arti-

[10] The court also rejected, without discussion, the government's alternative argument (Br. 16–18) that respondent had waived any claim under the Agreement by failing to raise such claim prior to trial.

[11] The court, however, rejected respondent's claim that Article IV(e) had been violated by his return to state prison in Massachusetts prior to his trial on the federal charges. Since respondent himself had requested the transfer, the court held that he waived any objection to the transfer under Article IV(e) (Pet. App. 21a–22a).

cle V(c) mandated dismissal of the indictment (*id.* at 25a)."

In dissent, Judge Moore expressed his unwillingness "to thwart the jury's determination of guilt" on the basis of calendar technicalities, "particularly where no showing of prejudice therefrom has been made" (Pet. App. 28a–29a).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. From the early 19th century, whenever the United States has sought to try state prisoners on federal charges, it has proceeded by serving state authorities with a writ of *habeas corpus ad prosequendum*, directing them to surrender custody of the prisoner to federal officials. Whether or not obedience to the writ was required, state officials routinely complied with its directive, enabling state prisoners to receive speedy disposition of the federal charges in accordance with their Sixth Amendment rights. In some cases, the federal government retained custody of the prisoner until after trial; in others, the prisoner was returned after arraignment to convenient state facilities pending further

[12] The court of appeals did not discuss the government's contention (Br. 28n*) that it should in any event dismiss only the charge upon which the detainer was filed (and respondent transferred to federal custody) and not the additional charges contained in the superseding indictment. Subsequently the Second Circuit has held that dismissal of charges upon which a detainer was based does not bar prosecution on other charges even though they arise out of the same conduct. *United States* v. *Cumberbatch*, No. 77-1070, decided September 19, 1977, petition for a writ of certiorari pending, No. 77-5590.

proceedings. While not without its occasions for abuse, the system appears to have been generally effective and to have caused little recorded complaint.

Different circumstances prevailed, however, when a state wished to try prisoners of the federal government or of another state. Inter-state transfers could typically be accomplished only through formal extradition proceedings or by means of a cumbersome process of agreement between the states' governors. Although federal prisoners could be obtained with less formality, states remained dependent on federal notions of comity, and the basis for surrendering federal custody was not always clear. As a consequence, states (which unlike the federal government were not thought to be subject to constitutional speedy trial requirements) often deferred their efforts to dispose of pending charges until after the prisoner was released from his existing sentence. Frequently, after having filed a notice of those charges with the incarcerating jurisdiction, they abandoned efforts at prosecution entirely.

The Interstate Agreement on Detainers, drafted in the late 1950s, simplified inter-state transfers and provided a method for the prisoner to clear outstanding detainers against him. Without subscription by the United States, however, member states were still forced to obtain federal prisoners by the traditional unstructured process, a problem that caused increasing concern after this Court held that the states must exercise greater efforts to try such prisoners. See *Smith* v. *Hooey*, 393 U.S. 374; *Dickey* v. *Florida*, 398 U.S. 30. Moreover, federal prison authorities ex-

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pressed their continuing concern about long-standing state detainers that interfered with prisoner treatment and rehabilitation.

2. In 1970, at the urging of the Department of Justice, Congress enacted legislation making the United States and the District of Columbia parties to the Interstate Agreement on Detainers. Although the 1970 Act essentially incorporated the entire Agreement without modification of its language and thus could be read to make the United States subject to the Agreement for all purposes, substantial evidence exists that Congress had no such intention. To begin with, the federal government did not need additional (indeed, less expedient) procedures to obtain state prisoners, in view of the well-established and smoothly functioning practice pursuant to the writ of *habeas corpus ad prosequendum*. Nor does it appear that the federal government had traditionally abused the detainer system, as some states had done. Furthermore, the language of several provisions of the Agreement applies awkwardly at best to the federal government as a receiving state and often leads to results that the Department of Justice, as a proponent of the legislation, can hardly have intended to encourage Finally, the Senate and House Reports and the brief debates all suggest an expectation that the United States would provide, but not seek, prisoners under the Agreement. In sum, there is virtually no evidence that Congress meant to surround the procurement of state prisoners for federal trial with new restrictions

or to cause significant new problems for federal prison authorities charged with the custody of such prisoners.

Post-Act developments are consistent with this understanding. After the Act became effective in 1971, the United States surrendered federal prisoners pursuant to the Agreement but continued, apparently without exception, to obtain state prisoners by writ of *habeas corpus ad prosequendum*. During that period, as before, state prisoners were given speedy trials in accordance with the constitutional guarantee and applicable local rules, but their cases were handled without regard to the special strictures of Article IV of the Agreement.

In the Speedy Trial Act of 1974 Congress provided a method by which state prisoners could clear federal detainers outstanding against them and made trials of prisoners subject to the time limits of that Act. Neither the Speedy Trial Act nor its legislative history in any way indicates that Congress thought the United States was already required to obtain state prisoners under the Agreement; to the contrary, relevant materials demonstrate Congress' intent to establish time limits and protections where it believed none previously existed.

The history of the Agreement therefore provides strong support for the belief that Congress intended the United States to participate only as a sending state. Such an interpretation would avoid needless conflict among the writ of *habeas corpus*, the Agreement, and the Speedy Trial Act and would allow federal prosecutors and prison officials to operate

under a uniform system without sacrifice of any substantial protections for state prisoners. Federal officials would continue to obtain state prisoners by writ of *habeas corpus,* subject to the time constraints of the Speedy Trial Act, and state prisoners could clear any detainers under the terms of that Act. At the same time state officials would be able to obtain federal prisoners pursuant to Article IV of the Agreement, and federal prisoners would be able to demand trial on outstanding state detainers under Article III.

3. Even if this Court concludes that the United States must be held to have adhered to the Agreement as a receiving as well as a sending state, it does not follow that the Agreement should be regarded as the exclusive means by which the United States can obtain state prisoners in connection with federal criminal proceedings or that the *ad prosequendum* writ is properly viewed as a "written request for temporary custody" within the meaning of Article IV of the Agreement. In the context of the Agreement, the word "request" is an ambiguous one when applied to the command of a judicially issued writ. In light of the complete absence of evidence that Congress in adopting the Agreement intended to impose conditions on the traditional writ of *habeas corpus* to make it more difficult for the United States to house and try state prisoners, and in light of the needless conflict that would otherwise be created with certain provisions of the Speedy Trial Act, we submit that the Court should construe the term "request" in Article IV of the Agreement as not encompassing the *ad prosequendum* writ.

The correctness of this construction is reinforced by the specific language of the speedy trial provision of the Agreement (Article IV(c)), invoked by the court of appeals to reverse respondent's conviction, which by its terms is applicable only "[i]n respect of any proceeding made possible by this article * * *." Whatever else may be said about the relationship between the writ and a "request" under the Agreement, it is beyond dispute that the procurement of state prisoners to stand trial on federal charges by means of the *ad prosequendum* writ was not "made possible" by the United States' adherence to the Agreement.

4. Finally, even assuming that respondent's rights under Article IV(c) of the Agreement were violated, he has nevertheless waived that claim by failing to raise it at any time in the district court. The right invoked by respondent for the first time in the court of appeals is not one of constitutional dimensions and, assuming there has been no violation of Sixth Amendment rights, does not suggest that the conviction of respondent was unjust, since it is unrelated to the reliability of the jury's verdict of guilt. The claim had ripened fully prior to trial and was capable of determination without the trial of the general issue. Unlike certain other claims of this type, Rule 12 of the Federal Rules of Criminal Procedure does not explicitly preserve the right to raise this claim at any time, from which it may fairly be inferred that the claim cannot be raised for the first time on appeal.

ARGUMENT

I. CONGRESS INTENDED THAT THE UNITED STATES PARTICIPATE IN THE INTERSTATE AGREEMENT ON DETAINERS ONLY FOR THE PURPOSE OF MAKING FEDERAL PRISONERS AVAILABLE TO OTHER MEMBER JURISDICTIONS AND ALLOWING THEM TO REQUEST TRIAL ON OUTSTANDING DETAINERS

The Second Circuit in the present case and in *United States* v. *Mauro, supra,* has concluded that the United States must observe all the conditions of the Interstate Agreement on Detainers even though it seeks to obtain state prisoners by writ of *habeas corpus ad prosequendum* without reliance on the Agreement. The court of appeals found that result to be compelled by the "clear and unequivocal language" of the Agreement and stated: "Any construction which would cast the United States in the role of a limited partner is at odds with the entire spirit and scope of the Agreement" (*United States* v. *Mauro,* 544 F. 2d at 594).

Substantial evidence exists, however, that Congress intended the United States to participate in the Agreement only for the purposes of allowing states more readily to obtain federal prisoners and allowing such prisoners to seek trial on outstanding detainers lodged against them with their federal custodian. As we shall discuss (pp. 22–29, *infra*); the Agreement was principally designed to provide states with a method of obtaining prisoners from other jurisdictions and to eliminate the related effects of stale detainers on prisoner rehabilitation. Because the federal government had long been able to obtain

state prisoners by writ of *habeas corpus ad prosequendum,* and because the Sixth Amendment required speedy trial on federal charges, those concerns were not prominent with regard to federal prosecutions. Moreover, to the extent that outstanding federal detainers and delayed federal trials were even a modest problem, Congress corrected it by the Speedy Trial Act of 1974. Thus, it is at odds with the congressional intent to construe the Agreement as a partial repeal of the federal *habeas corpus* statute—a construction that, in addition, conflicts with the provisions of the Speedy Trial Act.

We recognize that the term "state" in the Agreement is defined to include the United States and carries no disclaimer that the United States shall participate only as a sending state. But a literal reading of the statute, in our view, leads to inconsistencies, even absurdities, that can be avoided by construing the Agreement in the context of its purpose and history and with proper regard for the teachings of other federal statutes. See *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 10. Although the language of a statute remains the best evidence of the legislative intent, it "cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States* v. *Champlin Refining Co.,* 341 U.S. 290, 297; *Church of the Holy Trinity* v. *United States,* 143 U.S. 457. Moreover, it is appropriate to study the statute in conjunction with other statutes addressing the same or similar problems and to give each statute consistent meanings to the extent

possible. *Kokoszka* v. *Belford*, 417 U.S. 642; *British American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U.S. 159; *Ryan* v. *Carter*, 93 U.S. 78. We now turn to those materials.

A. THE WRIT OF *HABEAS CORPUS AD PROSEQUENDUM*

Since enactment of the First Judiciary Act in 1789, 1 Stat. 81, the writ of *habeas corpus ad prosequendum* has been available to federal authorities for the purpose of obtaining prisoners for trial. Although the Judiciary Act did not specifically mention the writ *ad prosequendum*, Mr. Chief Justice Marshall, in *Ex parte Bollman*, 4 Cranch 75 (1807), soon established that the term "*habeas corpus*," as found in the statute, was a generic term encompassing many different species of the writ including the writ *ad prosequendum*. Relying on 3 Blackstone, *Commentaries* 129, the Chief Justice further noted that authority to issue the *ad prosequendum* writ was " 'necessary to

[13] Section 14 of the First Judiciary Act gave authority to "all the * * * courts of the United States * * * to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And * * * either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. 1 Stat. 81–82 (1789)," quoted in *Carbo* v. *United States*, 364 U.S. 611, 614.

remove a prisoner, in order to prosecute [him], * * * or [for him] to be tried in the proper jurisdiction wherein the act was committed.' " 4 Cranch at 97. In *Carbo* v. *United States*, 364 U.S. 611, 615, this Court reiterated that Congress, in the Judiciary Act, "had without qualification authorized the customary issuance of the writ *ad prosequendum* by a jurisdiction not the same as that wherein the prisoner was confined."

Although Congress has revised the *habeas corpus* statute (now 28 U.S.C. 2241) on several occasions, "there is no indication that there is required today a more restricted view of the writ of *habeas corpus ad prosequendum* than was necessary in 1807 when Chief Justice Marshall considered it." *Carbo* v. *United States, supra*, 364 U.S. at 619–620. To the contrary, Congressional enactments after 1789 served to increase the power of the writ by clarifying the authority of the federal courts to issue the writ without jurisdictional limitation throughout the territory of the United States. *Id.* at 615–618.[14] The writ thus has remained "necessary as a tool for jurisdictional potency

[14] It was not until 1948, however, that an explicit reference to the *ad prosequendum* writ was contained in a federal statute. Section 2241 of Title 28 was enacted as part of a comprehensive effort by Congress to codify and revise the laws relating to the federal judiciary and judicial procedure. S. Rep. No. 1559, 80th Cong., 2d Sess. 1 (1948). In recommending passage of the legislation, the report of the Senate Judiciary Committee stated that "a thorough codification and revision of the statutes relating to the judiciary and its procedure is very much in the public interest in order that the law in this important field may be clear, certain, and readily available." *Ibid.*

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as well as administrative efficiency" (*id.* at 618) and has gained increasing importance, especially in instances requiring accommodation between federal and state authorities in facilitating the interjurisdictional transfer of prisoners (*id.* at 620–621).

It appears that state authorities have routinely complied with the writ *ad prosequendum* throughout its long history. See *United States* v. *Kenaan,* 557 F. 2d 912, 915 n. 8 (C.A. 1), petition for a writ of certiorari pending, No. 77–206; *United States* v. *Sorrell* and *United States* v. *Thompson,* C.A. 3, Nos. 76–1647 and 76–1976, decided August 22, 1977 (*en banc*), petition for writs of certiorari pending, No. 77–593, dissenting opinion of Garth, J., at 11. Although a line of federal cases has assumed without much analysis that the states comply only as a matter of comity,[15] we think that Judge Mansfield, dissenting in *Mauro,* was surely correct that "if a state institution refused to obey a federal writ of habeas corpus ad prosequendum properly issued pursuant to § 2241 and thus provoked a federal-state confrontation, the writ would be held enforcible against the institution under the Supremacy Clause" (544 F. 2d at 596; footnote omitted). See *United States* v. *Scallion,* 548 F. 2d 1168, 1173, n. 7 (C.A. 5), petition for a writ of certiorari pending, No. 76–6559; *United States* v. *Kenaan, supra,* 557 F. 2d at 915 n. 8; cf. *Ex parte Royall,* 117 U.S. 241. Since issuance of a writ under Section 2241 is surely a legitimate exercise of the power of federal courts to adjudi-

[15] This Court in *Carbo* v. *United States, supra,* 364 U.S. at 620–621, n. 20, found it unnecessary to reach that question.

cate cases involving offenses against the criminal laws of the United States, in the event of a federal-state collision over the execution of a writ authorized by Section 2241, the federal court could legitimately enforce its process to vindicate federal laws. As Judge Mansfield observed (Pet. App. 19a), there is no necessary inconsistency between those cases recognizing "the role of comity in securing federal-state cooperation, and a case requiring application of the Supremacy Clause where comity might fail." Cf. *Wahrlich* v. *State of Arizona,* 479 F. 2d 1137, 1138, (C.A. 9), certiorari denied, 414 U.S. 1011; *Harris* v. *Brewer,* 434 F. 2d 166, 168 (C.A. 8); *Smith* v. *State of Kansas,* 356 F. 2d 654 (C.A. 10), certiorari denied, 389 U.S. 871.

The Interstate Agreement on Detainers, therefore, did not provide the United States with a sorely-needed method of obtaining state prisoners. Long before the Agreement had been drafted, the use of the writ to bring a state prisoner before a federal court for trial and sentence had become "standard operating procedure." *United States* v. *Schurman,* 84 F. Supp. 411, 413 (S.D. N.Y.).[16] In addition to aiding the federal

[16] The courts have generally subscribed to the proposition that a prisoner lacks standing to challenge the use of the *ad prosequendum* writ to bring him before the district court. See, *e.g., Ponzi* v. *Fessenden,* 258 U.S. 254, 260; *Chunn* v. *Clark,* 451 F. 2d 1005, 1006 (C.A. 5); *McDonald* v. *Ciccone,* 409 F. 2d 28, 30 (C.A. 8); *McDonald* v. *United States,* 403 F. 2d 37, 38 (C.A. 5); *Derengowski* v. *United States Marshal, Minneapolis Office, Minnesota Division,* 377 F. 2d 223, 223–224 (C.A. 8), certiorari denied, 389 U.S. 884; *United States ex rel. Moses* v. *Kipp,* 232 F. 2d 147, 149–150 (C.A. 7); *Stamphill* v. *Johnson,* 136 F. 2d 291, 292 (C.A. 9), certiorari

courts in the exercise of their jurisdiction over criminal cases, the writ *ad prosequendum* (which is subject to immediate execution) facilitated the expeditious resolution of pending criminal charges and thus helped to ensure the defendant a speedy trial in accordance with constitutional guarantees. See *McDonald* v. *Ciccone*, 409 F. 2d 28, 30 (C.A. 8); *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147, 149–150 (C.A. 7).

B. THE INTERSTATE AGREEMENT ON DETAINERS

Although the federal government had available a completely satisfactory mechanism for obtaining prisoners in other jurisdictions for trial, the experience of the individual states was quite different. Before promulgation of the Interstate Agreement on Detainers, state authorities had no uniform, expedient procedure, such as the writ, for obtaining custody of prisoners incarcerated by another state or by the federal government.

The traditional method by which state prosecuting authorities gained custody of a prisoner held in another state was the formal extradition proceeding (see United States Constitution, Art. IV, Section 2, cl. 2; 18 U.S.C. 3182; Uniform Criminal Extradition Act, 11 Uniform Laws Annotated, pp. 60 *et seq.* (West 1974)).[17] Under the Uniform Criminal Extradition Act, the prosecuting attorney in the requesting state

denied, 320 U.S. 776; *Alston* v. *United States*, 405 F. Supp. 354, 356 (W.D. Va.); *Rose* v. *United States*, 365 F. Supp. 841, 844 (N.D. Ill.); cf. *Frisbie* v. *Collins*, 342 U.S. 519.

[17] The Extradition Act has been adopted in 47 States.

first had to ask the governor of his state to issue a demand for return of the fugitive. The demand for rendition was issued to the governor of the holding state and had to meet certain formal requirements. Upon receipt of the demand, the governor of the holding state was entitled to investigate the relevant circumstances in order to determine whether the fugitive should be surrendered; if the governor decided to comply with the demand, he issued an arrest warrant against the fugitive. After execution of the governor's warrant, the fugitive was brought before a court, advised of his right to counsel, and allowed to test the legality of his arrest through *habeas corpus*. See Uniform Criminal Extradition Act, *supra*, at §§ 5, 10, 11.[18]

Alternatively, the governors of two states could enter into a special contract controlling the delivery of prisoners. While it was possible to provide for simplified procedures in such contracts, the effort involved, except where transfers were frequent, generally outweighed the benefits. Moreover, it was not feasible for each state to undertake negotiation of contracts with 49 other states simply to provide an alternative to the cumbersome extradition process.

State authorities seeking to procure federal prisoners did not have recourse to the extradition proc-

[18] Only certain questions may be raised in the *habeas* proceeding, including whether (1) a crime has been charged in the requesting state; (2) the fugitive in custody is the one charged; and (3) the fugitive was in the requesting state at the time the alleged crime was committed. See *Hyatt* v. *People ex rel. Corkran*, 188 U.S. 691, 709; *United States ex rel. Tucker* v. *Donovan*, 321 F. 2d 114, 116 (C.A. 2), certiorari denied *sub nom. Tucker* v. *Kross, Correction Commissioner*, 375 U.S. 977.

ess. See *Thomas* v. *Levi*, 422 F. Supp. 1027 (E.D. Pa.); cf. *United States* v. *Guy*, 456 F.2d 1157 (C.A. 8), certiorari denied, 409 U.S. 896; *Derengowski* v. *United States*, 404 F. 2d 778 (C.A. 8), certiorari denied, 394 U.S. 1024. To obtain federal prisoners, therefore, the states would petition federal officials either formally or informally and trust that the officials would comply as a matter of comity. *Ponzi* v. *Fessenden*, 258 U.S. 254; *Tarble's Case*, 13 Wall. 397; *Ableman* v. *Booth*, 21 How. 506. While the federal government generally cooperated with such efforts to dispose of charges pending against federal inmates (see *Smith* v. *Hooey*, 393 U.S. 374, 381, n. 13), federal prison officials were concerned about their authority to deliver prisoners into state custody (see Bureau of Prisons Policy Statement No. 2001.4, March 2, 1971),[19] and states were often reluctant to solicit exercise of their discretion. See, *e.g.*, *Smith* v. *Hooey*, *supra*, 393 U.S. at 376–377. The absence of a uniform, reliable, and speedy mechanism for transferring federal prisoners to the states for prosecution generated considerable confusion over the appropriate legal procedure to be used and often resulted in lengthy pretrial delays, undermining the interests of both the prisoner and the prosecuting authority. See,

[19] Under 18 U.S.C. 4085 the Attorney General is authorized to transfer a federal prisoner to a facility within the requesting state for trial on state charges, "if he finds it in the public interest to do so."

We note that one method of petitioning the federal government was by writ of *habeas corpus ad prosequendum* (see, *e.g.*, *United States ex rel. Esola* v. *Groomes*, 520 F. 2d 830 (C.A. 3)). While we believe that the Supremacy Clause requires state authorities to obey a *habeas corpus* writ issued in aid of the federal court's jurisdiction over criminal cases, the writs do not have the same effect when issued by state courts to federal authorities. In such cases, compliance with the writ is a discretionary matter. *Ponzi* v. *Fessenden*, *supra*.

e.g., *Trigg* v. *State of Tennessee*, 507 F. 2d 949 (C.A. 6), certiorari denied, 420 U.S. 938.

To meet (or perhaps to avoid) the limitations inherent in the formal legal procedures then available, law enforcement authorities developed an informal and unregulated practice whereby the jurisdiction in which charges were pending would, instead of trying to obtain the prisoner for prompt trial through the formal extradition process, simply file a "detainer" with prison officials holding the prisoner in another jurisdiction. This detainer did not request the prisoner's surrender but was simply "a notice to prison authorities that charges [were] pending against an inmate elsewhere, requesting the custodian to notify the sender before releasing the inmate." *Ridgeway* v. *United States*, 558 F.2d 357, 360 (C.A. 6). Prison officials customarily complied with this "request that the prisoner not be released until he could be taken into custody by the requesting state." *United States* v. *Kenaan*, *supra*, 557 F. 2d at 915. See also, Council of State Governments, *Suggested State Legislation Program for 1957*, p. 74 (1956); cf. *Moody* v. *Daggett*, 429 U.S. 78, 80–81, n. 2. The prosecuting authorities in the requesting jurisdiction, upon being notified of the prisoner's impending release, would either withdraw

the detainer or arrange to take custody of the prisoner at the time of his release.[20]

This system, while more convenient, had numerous detrimental side-effects. Because the prisoner was normally required to complete his sentence in the holding state before being tried in the requesting jurisdiction, extensive pre-trial delays occurred, with the resultant loss of evidence, disappearance of witnesses and fading memories. The difficulties in preparing a defense generally engendered by extensive delay were made worse for an inmate imprisoned outside the jurisdiction in which he was charged. See *Smith* v. *Hooey, supra,* 393 U.S. at 379–380. Furthermore, the existence of a detainer itself often caused prison officials to restrict the activities and privileges available to the prisoner, and the inmates sometimes lost interest in institutional opportunities because of continuing uncertainties about the disposition of outstanding charges.[21]

The Interstate Agreement on Detainers was promulgated in 1956 under the auspices of the Council of State Governments to correct this unsettled sit-

[20] The state still had to proceed through the extradition process at the time of the prisoner's release. At that time, however, authorities in the incarcerating state would have a diminished interest in resisting relinquishment of custody, and the prosecuting state had the benefit of additional time in which to decide whether to pursue the charges.

[21] Sentencing problems also arose. The court was faced with the dilemma of attempting to impose an appropriate sentence upon a convicted defendant against whom a detainer had been lodged by another jurisdiction and who thus faced the possibility of having to serve subsequent additional sentences. See Council of State Governments, *Suggested State Legislation Program for 1957, supra*.

uation.[22] Article I declares that it is the purpose of the Agreement "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." Article I also states that "proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures" and that "[i]t is the further purpose of this agreement to provide such cooperative procedures."

The Agreement sought to achieve its purposes in two ways. Article III of the Agreement (App., *infra*),

[22] The movement toward promulgation of the Agreement began in 1948, when the Joint Committee on Detainers was formed. The committee included representatives from several organizations interested in developing possible solutions to problems caused by the placing of detainers. The Joint Committee issued a report which contained a statement of "aims or guiding principles" for handling detainers. The statement stressed the need for prompt investigation and disposition of detainers, and for cooperative efforts among the states to settle detainers.

During 1955 and 1956 the Joint Committee on Detainers was informally reconstituted under the auspices of the Council of State Governments. The committee developed three specific proposals dealing with the disposition of detainers. The Interstate Agreement on Detainers was among the proposals, which were later approved at a conference jointly sponsored by the American Correctional Association, the Council of State Governments, the National Probation and Parole Association, and the New York Joint Legislative Committee on Interstate Cooperation. Council of State Governments, *Suggested State Legislation Program for 1957, supra*, at pp. 74–76. Presently, 46 states plus the United States and the District of Columbia are adherents to the Agreement.

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which is principally addressed to the problem of outstanding detainers, allows the inmate to initiate proceedings to dispose of pending charges underlying any detainers lodged against him by another jurisdiction.[23] Prison officials are required to notify the prisoner of any detainer filed against him and of his right to request final disposition of the charges on which the detainer is based. Article III(c). The prisoner may then send to the warden a written request for final disposition, which the warden is required to forward, together with a certificate of inmate status and an offer to deliver temporary custody of the prisoner, to the prosecutor in the jurisdiction in which the charges are pending. Articles III(a), III(b), and V(a).

Article IV of the Agreement, which is principally concerned with providing a method by which member states can obtain prisoners, permits a prosecutor to submit a written request for temporary custody or availability to the prison official in whose custody the prisoner is being held. Immediate delivery of the prisoner is not required, however, for "there shall be a

[23] Before this Court's decision in *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, which permitted the aggrieved prisoner to invoke *habeas corpus* in the district where the charges were pending, a prisoner had no other means to challenge the validity of the detainer and the underlying charges. The prisoner also had no statutory or constitutional entitlement to rehabilitative programs sufficient to invoke general principles of due process to challenge the effects, if any, of the existence of a detainer upon the conditions of his confinement. See *Moody* v. *Daggett*, 429 U.S. 78, 88, n. 9; *Solomon* v. *Benson*, C.A. 7, No. 76-1959, decided October 6, 1977, slip op. 7.

period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." Article IV(a). If the Governor does not disapprove the request, "the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had." Article V(a).

The Interstate Agreement on Detainers was drafted primarily with the states in mind. The possibility of joinder by the United States was left open, however, in view of the problems arising in certain state-federal situations (see pp. 30–32, *supra*). It is against that background that Congress enacted the Interstate Agreement on Detainers Act.

C. PASSAGE OF THE INTERSTATE AGREEMENT ON DETAINERS ACT

Although bills proposing federal enactment of the Agreement had been introduced as early as 1963 (H.R. 8365, 88th Cong., 1st Sess. (1963)) and again in 1968 (H.R. 15421, 90th Cong., 2d Sess. (1968); see H.R. Rep. No. 1332, 90th Cong., 2d Sess. (1968)), Congress did not finally pass the legislation until 1971. During that interval, decisions of this Court had made it increasingly imperative that states have ready access to federal prisoners wanted on state charges. In *Klopfer* v. *North Carolina*, 386 U.S. 213, this Court had held

that the Sixth Amendment right to a speedy trial was enforceable against the states under the Fourteenth Amendment. Shortly thereafter, in *Smith* v. *Hooey, supra,* and *Dickey* v. *Florida,* 398 U.S. 30, the Court made clear that state authorities must make a diligent effort to bring cases against prisoners to trial, even when the prisoner is serving a sentence in a federal institution outside the territorial jurisdiction of the prosecuting state. The Senate Report supporting enactment of the Agreement expressly referred to the *Smith* and *Dickey* decisions and stated that "enactment of this legislation would afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." S. Rep. No. 91–1356, 91st Cong., 2d Sess. 2 (1970). Thus, the general background of the Agreement and the specific events leading to its enactment by Congress suggest quite strongly that it was motivated by the desire to resolve problems faced by state governments in bringing cases against federal prisoners to trial.

That inference is supported by the materials before Congress at the time that the Act was passed.[24] For

[24] The Agreement was enacted without amendment of the original text as promulgated in 1956. Moreover, the Agreement was adopted by the Congress without opposition (see 116 Cong. Rec. 38840 (1970) (remarks of Senator Hruska); 116 Cong. Rec. 13999 (1970); *id.* at 38842, and was passed by both houses under suspension of the rules. 116 Cong. Rec. 14000 (1970); *id.*, at 38842. Accordingly, the materials prepared by the Council of State Governments may properly be used in construing the Agreement. See Sutherland, *Statutory Construction,* § 48.11, pp. 212–213 (4th ed. 1973).

example, the virtually identical House and Senate reports both emphasized the states' obligation (established by *Smith* and *Dickey*) "to make a diligent, good faith effort to bring a defendant to trial within a reasonable time, even when he is serving a sentence in a Federal prison outside the State involved" (S. Rep. No. 91–1356, *supra,* at 1; H.R. Rep. No. 91–1018, 91st Cong., 2d Sess. 2 (1970)). Similarly, in discussing the need for the legislation, the reports at no time mention problems with outstanding federal detainers but specifically note that "a majority of detainers filed by States are withdrawn near the conclusion of the Federal sentence" (S. Rep. No. 91–1356, *supra,* at 3; H.R. Rep. No. 91–1018, *supra,* at 3). The sections on impact and cost contain a statement by the Director of the Bureau of Prisons that "the cost of the legislation to the Federal Government would be comparatively small, *inasmuch as under the agreement costs are borne by the jurisdiction in which the charges are pending*" (emphasis supplied). S. Rep. No. 91–1356, *supra,* at 4; H.R. Rep. No. 91–1018, *supra* at 4.

We also note that the legislation had been introduced at the request of the Attorney General (H.R. Rep. No. 91–1018, *supra,* at 1) and that the Department of Justice gave it an unequivocal endorsement. In his supporting letters, the Deputy Attorney General expressed concern that "in the greater number of cases detainers filed by States are withdrawn when Federal release is imminent" and stressed the urgency for the legislation in view of the fact that "[a]s a

result of [the *Smith* decision], a number of States are requesting federal prisoners" (S. Rep. No. 91–1356, *supra*, at 5, 6; H.R. Rep. No. 91–1018, *supra*, at 5, 6). He also noted that transfer to state authorities under the prior unstructured practice was "not feasible because the Federal term must run uninterruptedly, and therefore the prisoner must remain in the custody of a Federal official" (*ibid.*). The letters contain no indication, however, that it was thought that the power of the federal government to obtain state prisoners would become subject to new restrictions, including the veto of a state governor, or that the federal government would be required to keep all state prisoners in federal custody pending complete disposition of the federal charges. Remarking on the smooth passage of the Act, one judge has observed: "The idea that there would have been 'no opposition whatsoever' to the sort of results which have occurred in these cases is hard to accept." *United States* v. *Thompson, supra*, dissenting opinion of Judge Garth.

The terms of the Agreement itself, either by occasioning unnecessary deviations from historical practice or creating awkward results, also indicate that Congress did not understand the Agreement as applying to the United States as a receiving state. We have already noted that, contrary to the findings in Article I, federal proceedings involving state prisoners had long been conducted in the absence of the Agreement and that extending a veto power over federal trials to state governors would, if anything, impede the "expeditious and orderly disposition" of federal charges.

Similarly, the speedy trial provisions of Article IV (c), requiring that trial be commenced within 120 days after the prisoner's arrival in the receiving state, apply by their terms only to "any proceeding made possible by this article," a phrasing that plainly implies the existence of proceedings made possible by other means.

The provisions prohibiting return of prisoners to their original place of imprisonment prior to trial (Articles III(d), IV(e)), also cause unique and unwarranted problems for federal prosecutors. Because Article III(d) (and perhaps Article IV(c)) require disposition of all outstanding charges within a receiving state before the prisoner may be returned, literal application of the Agreement to the United States would require a single federal prosecutor to coordinate federal charges at one time throughout the entire United States. At the same time, the prosecutor would be barred by Article V(d) from trying the prisoner on any other outstanding federal charges prior to returning the prisoner to state custody unless a detainer had also been lodged with respect to such charges prior to obtaining custody of the prisoner under the Agreement. Such a provision makes sense in the case of state-state transfers, because it preserves the preexisting principle of extradition that the delivery of the prisoner was solely for trial on the charge respecting which extradition was sought and is necessary to protect the correlative right of the governor of the sending state to refuse a request under Article IV(a) of the Agreement. It makes no sense when a prisoner is

sought for federal trial, since there is no corresponding right to refuse rendition of the prisoner.

Literal application of the Agreement would also compel abolition or revision of the common federal practice of returning prisoners to nearby state facilities pending further proceedings. This forced result would actually run counter to the interests of the sending state and the prisoner in rehabilitation since the prisoner would be held in temporary status in a federal holding facility (often a local jail) rather than being allowed to continue in his regular programs within the sending state. Moreover, application of the "no return" provision to state prisoners with pending federal charges would put a significant strain on already overcrowded federal facilities (see *United States* v. *Mauro, supra,* 544 F. 2d at 590; *United States* v. *Sorrell, supra,* and *United States* v. *Thompson, supra*) or create a complicated system of paper transfers between state and federal prisons carried out not to serve the end of prisoner rehabilitation but simply to obviate the risk of dismissal of charges for technical errors.[25]

D. SUBSEQUENT ADMINISTRATIVE INTERPRETATION AND CONGRESSIONAL ACTIONS

1. The Act became effective on March 9, 1971. Although the Bureau of Prisons drafted a policy state-

[25] The bizarre results that can be produced by a literal application of the ban on return to the sending state are illustrated by *United States* v. *Thompson, supra,* in which the Third Circuit held that federal charges must be dismissed after a state prisoner was returned to state authorities following an absence of a couple of hours for arraignment, simply because the federal government did not, as it could have done, designate the state facility as the place of federal detention. See p. 45, *infra.*

ment explaining the responsibilities of a sending state under the Agreement, it is quite clear that the Department of Justice did not regard the Agreement as controlling the actions of the United States as a receiving state. Section 6 of the Interstate Agreement on Detainers Act contains an express congressional directive to the Attorney General to "establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act." Although there are hundreds, or even thousands, of cases each year in which state prisoners are obtained to face federal charges, and although the Agreement is replete with potential traps for the unwary prosecutor who overlooks the speedy trial and "no return" obligations imposed by Articles IV(c) and IV(e), the Department of Justice took no steps during the four and a half years between the effective date of the Agreement and the decision of the district court in *Mauro* to notify United States Attorneys of the obligations that accrue upon receipt of a prisoner from another jurisdiction pursuant to the Agreement.[25a]

[25a] Indeed, pursuant to Article VII of the Agreement, the Attorney General designated the Director of the Bureau of Prisons as the administrator of the Agreement for the federal government. 28 C.F.R. 0.96(q) and 0.96a (1971). That action reinforces the understanding that the United States participated in the Agreement on a limited basis, for while the Bureau of Prisons is deeply involved in the activities of the United States as a sending state, it would have virtually no role, other than the temporary housing of state prisoners, in use of the Agreement by the United States as a receiving state.

One can only conclude from this that the Department did not understand the Agreement to impose restrictions upon the United States when it was prosecuting state prisoners. The *ad prosequendum* writ continued to be utilized during this period to procure state prisoners, who were then regularly returned to state custody between the time of arraignment and trial on the federal charges, particularly when, as was often the case, the federal district in which charges were pending was located in the state of the prisoner's incarceration. And, so far as we can ascertain, federal judges and prosecutors calendared cases on the basis of local prompt-disposition plans rather than hewing to the deadlines and procedures of the speedy trial provisions of Article IV(c) of the Agreement.[26]

These actions of the Department of Justice, which sought passage of the legislation and was charged with its administration, are entitled to considerable weight in determining the meaning of the Act. *Youakim* v. *Miller,* 425 U.S. 231; *Johnson* v. *Robison,* 415 U.S. 361; *Perkins* v. *Matthews,* 400 U.S. 379; *United States* v. *American Trucking Ass'ns,* 310 U.S. 534.[27]

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[26] It was only with the decision of the district court in *Mauro* and ensuing adverse decisions in other courts that the Department realized that the Agreement might be construed to impose obligations upon the United States as a receiving state even when the attendance of a state prisoner had been obtained by means of the *ad prosequendum* writ. The Department of Justice has since taken steps to apprise United States Attorneys of the possible applicability of the Agreement in such circumstances, including the publication of several items in the United States Attorneys' Bulletin.

[27] State officials also generally do not appear to have treated the *ad prosequendum* writ issued by a federal court as constituting

2. Subsequent actions by Congress support this administrative interpretation. In January 1975, Congress enacted the federal Speedy Trial Act, 18 U.S.C. (Supp. V) 3161 *et seq.,* which contains specific and detailed provisions governing the interjurisdictional transfer of a prisoner "charged with an offense [and] serving a term of imprisonment in any penal institution." 18 U.S.C. (Supp. V) 3161(j)(1). The Act requires the federal government either to "undertake to obtain the presence of the prisoner for trial" (the Act does not specify the procedure by which the prisoner's presence may be secured) or to "cause a detainer to be filed with the person having custody of the prisoner," who is then obliged to inform the prisoner of the detainer and of his right to demand trial. If such a demand is made, the Act provides that the government must promptly seek to obtain the

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a "written request for temporary custody" activating their obligations under Article IV of the Agreement. The writs normally command delivery of the prisoner in fewer than 30 days, and their commands appear generally to have been obeyed without allowing the passage of the 30-day period for gubernatorial disapproval specified by the proviso to Article IV(a). And while it is impossible to state this with any assurance, as far as we are aware state custodians did not generally supply the notice provided by Article IV(b) to other United States Attorneys who had lodged detainers against a prisoner in those instances in which federal charges were pending in more than one district.

The defense bar seems also to have been unaware for the first few years after federal adherence to the Agreement of the possibility that the United States had incurred obligations thereunder as a receiving state. We have found only one published case prior to the district court's December 1975 decision in *Mauro* in which a claim was made by a defendant in such a context. *United States* v. *Ricketson,* 498 F. 2d 367 (C.A. 7), certiorari denied, 419 U.S. 965.

prisoner's presence. 18 U.S.C. (Supp. V) 3161(j)(1)–(3).

Were the Interstate Agreement on Detainers already applicable to the United States as a receiving state, the provisions of the Speedy Trial Act relating to transfers of prisoners would be at best redundant and at worst directly inconsistent. Both Acts allow state prisoners to seek trial on federal charges after a detainer is filed, and both Acts contemplate that the federal government shall assure speedy trials. However, the Speedy Trial Act provides that trial must commence within 60 days of arraignment (Section 3161(c)), while the Agreement provides that trial must occur either within 180 days after the prosecutor's receipt of the prisoner's demand for final disposition of the charges, or within 120 days of the prisoner's arrival in the receiving state pursuant to a prosecutorial request for custody (Article V(c)). The Speedy Trial Act has elaborate tolling provisions (Sections 3161(h) and (i)) that the Agreement lacks. Likewise, the Agreement provides that the prisoner may not be returned to the sending state before trial (Articles III(d), IV(e)), while the Act has no such provision.

The Speedy Trial Act also requires that a defendant be arraigned within ten days following the filing of an indictment. Section 3161(c). The legislative history of the Speedy Trial Act indicates that Congress intended the arraignment of an imprisoned defendant to take place within the ten-day period "where the defendant's presence could have been obtained by the exercise of prosecutorial initiative."

H.R. Rep. No. 93–1508, 93d Cong., 2d Sess. 31 (1974). Although the House Report also indicates that delay resulting from proceedings to transfer the prisoner is excludable in determining compliance with the time limitations under the Act (*id.* at 36), the Agreement *requires* a 30-day delay, even though the federal prosecutor may wish to process charges immediately and set the case for trial. Thus, the Agreement, if applied to the United States as a receiving state, would actually interfere with the manifest purpose of the Speedy Trial Act. See also *United States* v. *Sorrell*, and *United States* v. *Thompson, supra*, dissenting opinion of Weis, J., at 5.[28]

The language and legislative history of the Speedy Trial Act are totally inconsistent with the notion that there was any belief on the part of Congress that the United States was already operating under a totally comprehensive scheme governing the federal trial of state prisoners,[29] which the Agreement, as construed

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[28] As noted earlier (n. 16, *supra*), prisoners traditionally have been deemed to lack standing to challenge their production by means of the writ, since the transfer is solely a matter between the authorities of the two jurisdictions involved. If the Article IV(a) provision is held applicable to the writ, however, prisoners will have a new method for attempting to block valid criminal prosecutions, without any indication that such a result was intended by Congress.

[29] Although it would be possible to argue that the Speedy Trial Act applies only to federal trials of *federal* prisoners, that construction is not persuasive. First, the plain language of the Act speaks of prisoners "in *any* penal institution" without distinction, and can be limited to federal prisoners only by choosing to construe it in light of the language of the Agreement. If the statutes are read together with regard to the Congressional intent, how-

by the court of appeals in this case and in *United States* v. *Mauro, supra,* would be. The Speedy Trial Act's provisions regarding trial of already incarcerated individuals were derived from standards promulgated by the American Bar Association that "tracked a modern trend in State case law that holds that the government must exercise some degree of diligence in trying to obtain an imprisoned defendant's presence for trial * * *." (H.R. Rep. No. 93–1508, *supra,* at 34). Without any mention of the federal government, the Report then notes specifically that "[a] significant number of States * * * have ratified the draft of An Interstate Agreement on Detainers" (*ibid.*); this suggests a definite understanding that the federal government was not viewed as subject to comparable restrictions.[30] Similarly, in discussing the sanctions to be imposed on government

ever, that construction cannot be justified. Moreover, that construction would attribute to Congress an intent to impose different standards on federal prosecutors for state and federal prisoners, an illogical conclusion that finds no support in the language or legislative history of either Act.

[30] The provisions embodied in Section 3161(j) originated in Standard 3.1 of the American Bar Association's *Standards Relating to Speedy Trial* "as recommended by the Advisory Committee on the Criminal Trial in 1967, and approved by the House of Delegates in 1968." H.R. Rep. No. 93–1508, *supra,* at 34. Thus, the standard on which the Speedy Trial Act provisions are based was formulated prior to Congressional enactment of the Agreement. The House committee further noted that the ABA standard served as a model for a more general detainer provision in Section 9(b) of the *Model Plan for the United States District Courts of Achieving Prompt Disposition of Criminal Cases,* promulgated by the Judicial Conference pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure. *Ibid.*

attorneys for unreasonable delay (18 U.S.C. (Supp. V) 3162(b)(4)), the House Report (*id.* at 36) contrasts the practice under the Agreement, stating that federal prosecutors should not suffer any hardship in the context of prisoner cases "since, unlike state practice in many jurisdictions [and under the Agreement] where the period in which the prisoner must be tried begins upon receipt of the demand for trial, the time limits do not apply until the defendant is actually present for * * * pleading."

Although the enactments of a later Congress are not conclusive regarding the intent of an earlier Congress, the actions of Congress in adopting the Speedy Trial Act surely constitute significant support for our basic submission—that, in adopting the Agreement, Congress did not understand that it would significantly alter the terms upon which the United States might obtain custody of State prisoners for federal prosecution. See *Califano* v. *Sanders,* 430 U.S. 99, 105–107.

There are two additional indications of Congress' view of the United States' role under the Agreement. A draft of the Senate Judiciary Committee Report on S. 1, 94th Cong., 1st Sess. (1975), the precursor of the comprehensive criminal code revision currently pending in Congress, states in pertinent part (S. Rep. No. 94–00, 94th Cong., 1st Sess. 984 (1975); emphasis in original):

> Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the

> Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ.

Moreover, legislation currently pending in Congress would amend the Agreement's enabling statute by providing that the United States is a party to the agreement "as a 'sending state' for purposes of Article III and IV, but as a 'receiving State' for purposes of Article III only." S. 1437, 95th Cong., 1st Sess., Section 3201 (1977); H.R. 6869, 95th Cong., 1st Sess., Section 3201 (1977). Although that proposal would make the United States a receiving state for some purposes and consequently raise a partial inconsistency with the Speedy Trial Act, it would avoid many of the problems caused by reading the Agreement to make the United States a receiving state for all purposes and to circumscribe greatly the force and function of the historic writ of *habeas corpus ad prosequendum*.

3. While it is not a simple matter to reconcile the provisions of the *habeas corpus* statute, the Interstate Agreement on Detainers, and the Speedy Trial Act, we submit that the court of appeals in this case erred by giving conclusive effect to a literal reading of the Agreement based upon its definition of the United States as a "state" without distinction between the sending and receiving roles.[31] As we have discussed,

[31] We do not agree, however, that the Agreement, even read literally, supports the result reached by the court of appeals. See Part II, *infra*.

that interpretation is not in accordance with the Congressional understanding. Nor, we submit, is it necessary in order to protect substantial rights of state prisoners facing federal charges or to achieve any of the important objectives of the Agreement. The writ of *habeas corpus ad prosequendum*, backed by the Sixth Amendment and the Speedy Trial Act, serves those purposes equally well.

Thus, if the United States is understood to be only a sending state for purposes of the Agreement, it may seek state prisoners for trial on federal charges, as it has consistently in the past, by the *ad prosequendum* writ. Under the Speedy Trial Act, 18 U.S.C. (Supp. V) 3161(j)(1), a government attorney who "knows that a person charged with an offense is serving a term of imprisonment in any penal institution" must promptly "undertake to obtain the presence of the prisoner for trial," unless he promptly "cause[s] a detainer to be filed with the person having custody of the prisoner and request[s] him to so advise the prisoner and to advise the prisoner of his right to demand trial." Should he pursue the former course, the arraignment must be held within 10 days of the filing of the indictment, and the trial held within 60 days of the arraignment (Section 3161(c)), excluding "[a]ny period of delay resulting from other proceedings concerning the defendant" (Section 3161(h)(1)) and various other periods of delay (Section 3161(h)(2) and (8)). Should he elect to lodge a detainer, the defendant may demand trial (Section 3161(j)(3) (Supp V)), and "[u]pon the receipt of

such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial." Again, the prisoner must be tried within 60 days of his arraignment. States would retain the right, of course, to request federal prisoners under Article IV of the Agreement.

The foregoing reconciliation of the various pertinent federal statutes creates a rational structure regulating the trial of federal prisoners on state charges and of state prisoners on federal charges. The protections afforded by Article IV of the Agreement in the case of state-state prisoner transfers become superfluous in the case of state-federal transfers because of the availability of the protections of the Speedy Trial Act.

It is true, of course, that nothing in the *habeas corpus* statute or the Speedy Trial Act provides for an automatic dismissal of charges where the defendant has been returned to the state prison before his federal trial, see *United States* v. *Mauro, supra,* but in the context of federal prosecutions of state prisoners, that requirement creates far more problems than it solves. Unlike interstate transfers, the production of state prisoners to face federal charges often takes place within the same state (see *United States* v. *Mauro, supra; United States* v. *Kenaan, supra; United States* v. *Sorrell, supra; United States* v. *Thompson, supra*), and in such circumstances return of the prisoner to the state prison enables him to continue his rehabilitation with minimal disruption. Since the writ is subject to immediate execution, there is also no

problem with the cumulative 30-day delays that a series of requests under Article IV would require. Moreover, it is quite common for federal authorities to designate state prisons as places of federal detention. Unless the Agreement was intended to prohibit this practice,[22] the so-called "right" not to be returned is, in the state-federal context, really nothing more than an opportunity to take advantage of clerical errors or similar technicalities. Preservation of that possibility is not essential to a fair system of state-federal transfers.

Moreover, mechanical insistence on this "right" may lead to ridiculous results. In *United States* v. *Sorrell, supra,* and *United States* v. *Thompson, supra,* the Third Circuit, relying in part on the Second Circuit's opinion in *Mauro,* held that otherwise valid federal indictments had to be dismissed because the defendants had been returned to Pennsylvania state prisons without trial following their arraignments in the Philadelphia district court pursuant to writs *ad prosequendum,* even though there are no federal facilities in Philadelphia for housing defendants awaiting federal trial. In both cases, the defendants were removed from nearby state facilities, produced for arraignment before the district court, and returned to the state prison the same day. In *Sorrell,* the interuption of the defendant's rehabilitation program consisted solely of travel time between the state facility

[22] There is no evidence that Congress believed the federal government would have to eliminate this practice upon passage of the Agreement.

and the federal courthouse and a brief courtroom appearance for arraignment; in *Thompson,* the defendant was returned following arraignment to a state prison located less than 10 miles from the courthouse, which was also used to house federal prisoners pursuant to a contract between the United States and the Commonwealth of Pennsylvania. Thus, had the United States arranged for the technical "paper" transfer of Thompson from state to federal custody, even though he would have remained in the very same institution, the indictment would not have been dismissed.[33]

We therefore believe that although the language of the Interstate Agreement on Detainers does not expressly reflect the understanding of Congress that the United States would participate only as a sending state, it should be interpreted in light of the *habeas corpus* statute and the Speedy Trial Act to embody that understanding. In that event, of course, respondent would not be entitled to rely on the speedy trial provisions of the Act, though he would be entitled to have his speedy trial claims considered in terms of the Sixth Amendment guarantee and local rules.[34]

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[33] We recognize that, under the Second Circuit's ruling in *United States* v. *Chico*, 558 F.2d 1047, that court would not hold the Agreement applicable under the circumstances which obtained in *Sorrell* and *Thompson*. Nevertheless, we believe that those cases are relevant to appreciate the extreme consequences that may result from adherence to the decision below.

[34] Respondent raised claims under the Sixth Amendment and Rule 4 of the Plan for Prompt Disposition of Criminal Cases of the Southern District of New York (Pet. App. 5a, n. 4). The court of appeals did not reach those issues (*ibid*).

If the Court concludes that the United States is a receiving as well as a sending state, however, we submit that the Agreement is nevertheless inapplicable to this case, where respondent was produced pursuant to an *ad prosequendum* writ. Even strictly adhering to the language of the Agreement, there is no sound basis for concluding that the writ should be treated as a "request" under Article IV. We next discuss this point.

II. A WRIT OF *HABEAS CORPUS AD PROSEQUENDUM* IS NOT A "REQUEST" FOR PURPOSES OF ARTICLE IV OF THE AGREEMENT

We have previously discussed (pp. 18–22, *supra*) the long-standing federal practice of obtaining state prisoners by means of the writ of *habeas corpus ad prosequendum,* a method that proved wholly satisfactory. The court of appeals in this case held, however, that Congress intended to condition further use of the writ upon compliance with Article IV of the Interstate Agreement on Detainers. The court reached that result by concluding that "whether or not a writ of habeas corpus ad prosequendum constitutes a 'detainer,' see *United States* v. *Mauro, supra,* once a federal detainer has been lodged against a state prisoner the habeas writ constitutes a 'written request for temporary custody' within the meaning of Article IV of the Detainers Act" (Pet. App. 21a). We recognize that the term "request" is sufficiently ambiguous that it admits of the broad definition given by the court of appeals, encompassing the demand embodied in the court-issued writ *ad prosequendum,* but this construc-

tion can hardly be said to be compelled by the statutory language, and, we submit, the terms of the statute and its legislative history compel the opposite result.[25]

It is well established that a repealer of an existing statute will not be lightly inferred from the passage of potentially inconsistent legislation. *Rosencrans* v. *United States,* 165 U.S. 257, 262; *United States* v. *Jackson,* 302 U.S. 628, 632; *Colorado River Water Conservation Dist.* v. *United States,* 421 U.S. 946. By issuance of an *ad prosequendum* writ, the United States for nearly 200 years has been able to obtain custody of a state prisoner for federal trial. The writ has been subject to immediate execution, and, it is believed (pp. 20–21, *supra*), compliance with its terms has been mandatory upon the states. If continued housing of the prisoner during federal proceedings could be better handled by the state authorities or if such an arrangement were more consistent with his rehabilitation prospects, the federal government was always free to return the prisoner to state prison. Speedy trials have always been required, of course, under the Sixth Amendment and, later, under applicable local rules.

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[25] In the Speedy Trial Act, which in our view does apply to proceedings initiated by the *ad prosequendum* writ, Congress has provided that a government attorney may secure a prisoner by presenting "a properly supported request for temporary custody of such prisoner for trial" (18 U.S.C. (Supp. V) 3161(j)(4)). As the legislative history of the Speedy Trial Act, unlike the history of the Detainers Act, unequivocally shows that its provisions are to have broad applicability (see, *e.g.*, H.R. Rept. No. 93–1508, *supra*), we believe that the term "request," as used in the Act, would include an *ad prosequendum* writ.

Neither the language nor the legislative history of the Interstate Agreement on Detainers Act makes any mention of the writ or suggests an intention to impose unnecessary conditions on its use (see pp. 29–34, *supra*). Had Congress intended to transform the writ into a mere "request" to state officials, rather than a demand presumably backed by the force of the Supremacy Clause, some recognition of that fact surely would have been indicated. Similarly, some reference would be expected to the provision of Article IV(a) requiring a 30-day delay before the writ could be honored. Yet Congress appears to have contemplated neither these changes nor the additional restrictions placed upon return of the prisoner to state facilities or the timing of federal trials.

Moreover, the speedy trial provisions of Article IV(c), on which respondent relies, apply by their terms only to "any proceeding made possible by this Article." While that language may be appropriate when a state receives custody of a prisoner through the Agreement rather than through the cumbersome extradition process, it is simply inapplicable when the United States obtains a prisoner pursuant to the writ *ad prosequendum*. Production of state prisoners by way of the writ had been "standard operating procedure" well before 1971 (see *United States* v. *Schurman, supra*) and was not in any sense "made possible" by federal subscription to the Agreement. Thus, under a literal reading of Article IV(c), the speedy trial requirements do not apply to proceedings initiated by the *ad prosequendum* writ.

The relevant committee reports state that the Agreement "provides *a* method [for] prosecuting authorities [to] secure prisoners serving sentences in other jurisdictions," S. Rep. No. 91–1356, *supra,* at 2; H.R. Rep. No. 91–1018, *supra,* at 2 (emphasis supplied). They thus negate the suggestion that the Agreement was being adopted as the sole method. The Fifth Circuit has observed: "Had there been an intent to make the Agreement exclusive and to, thereby, impliedly repeal 28 U.S.C. § 2241(c)(5), the committees would hardly have used the word 'a' to describe the method provided by the Agreement." *United States* v. *Scallion, supra,* 548 F. 2d at 1171 (footnote omitted).

The conditions imposed on the prosecution by Article IV, sensibly read, are the *quid pro quo* for the procedure made available to the prosecution by Article IV. For states that otherwise would be relegated to extradition proceedings, acceptance of those conditions is both reasonable and desirable. But it is completely different to suppose that Congress, which was concerned with giving the states a means to obtain federal prisoners, intended to impose new and at times burdensome conditions on the federal government when the latter derived no benefit from the Agreement but followed the traditional method used long before the Agreement was drafted.[36]

[36] Quite plainly, the Massachusetts authorities in this case did not consider the writ as a "request" subject to a 30-day period of delay any more than the district court and the prosecutor had. They delivered respondent promptly to federal custody within one week from the date the writ was issued.

The court of appeals, while noting that this position "might at first blush appear to have some theoretical appeal" (Pet. App. 7a), found it ultimately inconsistent with "Congress' purpose * * * which was to provide a comprehensive and coherent solution to a multiplicity of problems that had prior to the adoption of the Act beset prisoners, prosecutors, judges, prison authorities, and parole boards alike under the old detainer system" (Pet. App. 18a–19a). In determining "Congress' purpose," however, the court relied entirely on cases and articles dealing with the general detainer problem (Pet. App. 8a–17a)—materials that were almost invariably concerned with disposition of state charges—and completely ignored the more pertinent materials actually before Congress. As we have discussed (pp. 29–32, *supra*), Congress considered this legislation at the urging of the Department of Justice, in light of this Court's decisions in *Smith* v. *Hooey, supra,* and *Dickey* v. *Florida, supra,* and was primarily concerned with giving states greater access to federal prisoners and with disposing of long-standing (often eventually untried) state detainers.

Moreover, to the extent that Congress might have been concerned about the effects of federal detainers, it makes no sense to suppose that it attacked the problem by imposing additional conditions on federal prosecutors already processing the federal charges by writ of *habeas corpus ad prosequendum.* The remedy for stale detainers is found in Article III, which allows the prisoner to request trial on any untried indictment, information, or complaint upon which a

detainer has been lodged, and which requires prosecutors in the appropriate jurisdictions to bring him to trial within 180 days of delivery of that request. Article IV, on the other hand, was included to give member jurisdictions an expedient method of obtaining prisoners, a non-existent problem for the federal government. It is thus unnecessary and illogical to construe Article IV broadly in order to meet concerns already addressed in Article III.

The court of appeals also neglected Congress' further efforts to deal with the detainer problem in the Speedy Trial Act (see pp. 37–41, *supra*). In deciding whether Congress intended by the Detainers Act "to provide a comprehensive and coherent solution" to the detainer problem, it is surely significant that Congress four years later passed legislation to give prisoners the right to a speedy trial on all federal detainers—and that it did so without any suggestion that the issue was already dealt with by existing legislation. That later action is consistent with the position that Congress enacted the Detainers Act to solve specific problems concerning state charges and detainers, not to revise significantly the procedures by which the federal government had brought state prisoners to trial.

In sum, assuming this Court concludes that the United States adhered to the Agreement in 1971 as both a receiving and a sending state, sound principles of statutory construction nevertheless compel the conclusion that the writ of *habeas corpus ad prosequendum* is not a "written request for temporary

custody" subjecting federal prosecutors to the speedy trial and "no return" provisions of Article IV of the Agreement.

III. RESPONDENT WAIVED HIS RIGHT TO INVOKE THE SPEEDY TRIAL REQUIREMENTS OF THE AGREEMENT BY FAILING TO RAISE THE ISSUE BEFORE THE DISTRICT COURT

Shortly after respondent was arrested by federal authorities, and before any indictment had been filed, he sent letters to the United States Attorney and the United States District Court for the Southern District of New York requesting a speedy trial on the federal charges (App. 87–90). On November 4, 1974, respondent moved to dismiss the superseding indictment on speedy trial grounds (App. 83–86), and on February 18, 1975, he opposed a further continuance of his trial on that basis (App. 93–94). On September 2, 1975, at the commencement of his trial, respondent again sought unsuccessfully to have the indictment dismissed for want of a speedy trial (App. 100–105). Respondent relied solely on the Sixth Amendment and the local rules of the Southern District as the basis for his contentions; no reference was made to the Interstate Agreement on Detainers.

Respondent's trial took six days. The government called 36 witnesses and read the stipulated testimony of 12 additional witnesses to the jury. At the conclusion of trial the jury found respondent guilty on all counts. At no time during or after trial did respondent claim before the district court that he was

being denied rights under the Interstate Agreement. That issue was first raised in respondent's brief before the court of appeals; that court, without discussing the consequences, if any, of respondent's dilatoriness, concluded that the Agreement required dismissal of all charges.

We submit that respondent's failure to present his claim under the Agreement to the district court constituted a waiver of that claim as a matter of federal law.[37] Although "an approach, [which] presum[es] waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights," *Barker* v. *Wingo,* 407 U.S. 514, 525, the right to trial within a specified period under the Interstate Agreement is neither constitutional nor fundamental. Unlike the Sixth Amendment right to a speedy trial, which is "one of the most basic rights preserved by our Constitution," *Klopfer* v. *North Carolina,* 386 U.S. 213, 226, the right to an expedited trial under the Agreement is a matter of legislative grace subject to limitation or revocation at the discretion of Congress. While the provisions of Article IV(c), assuming they are applicable at all, do provide benefits to state prisoners, it is doubtful that Congress intended defendants to be able to claim those benefits at any stage of the proceedings against them, whatever the effect on customary judicial procedures might be.

[37] This argument was made by the government to the court of appeals (see Br. 18–20).

By its nature, the right to an expedited trial under the Agreement is more closely analogous to rights conferred by various statutes of limitations, see *e.g.,* 18 U.S.C. 3282 *et seq.,* than to the constitutional right to a speedy trial.[38] Like the statutory speedy trial right, statutes of limitations serve interests of the potential criminal defendant in limiting the period of uncertainty and anxiety that he faces as well as interests of the public in assuring more expeditious resolution of criminal cases. Yet it is well-established that "[t]he statute of limitations is a defense and must be asserted *on the trial* by the defendant in criminal cases, *United States* v. *Cook,* 17 Wall. 168 * * *." *Biddinger* v. *Commissioner of Police,* 245 U.S. 128, 135 (emphasis supplied). See also *United States* v. *Wild,* 551 F. 2d 418, 422 and n. 7 (C.A. D.C.); *United States* v. *Franklin,* 188 F. 2d 182 (C.A. 7). Even a post-trial motion before the trial court has been regarded as too late to invoke the statute of limitations as a bar to prosecution and conviction. *United States* v. *Kenner,* 354 F. 2d 780 (C.A. 2). "The defense of the statute of limitations must be raised before or during the trial. 'If this is not done and a verdict of guilty is rendered, sentence may be validly imposed' " (*id.* at 785; citations omitted).[39] We believe that a similar rule is ap-

[38] Even where the constitutional right is involved, failure to assert it is significant. "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker* v. *Wingo, supra,* 407 U.S. at 532.

[39] An exception has been made where the facts giving rise to the statute of limitations claim could not have been known until the verdict. See *Askins* v. *United States,* 251 F. 2d 909 (C.A. D.C.) (defendant indicted for capital offense without statute of limita-

propriate where the defendant belatedly relies on a statutory speedy trial claim.

Indeed, Rule 12, Fed. R. Crim. P., appears to preclude presentation of such claims for the first time on appeal. Subsection (b) of Rule 12 provides that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion" and further sets out certain objections that must be raised before trial. Under subsection (f), failure to raise the latter objections at the specified time "shall constitute waiver therefor." Although a defense based on a statute of limitations or an expedited trial statute may not be included within the category of defenses that must be raised *before* trial, it does not follow that a defendant may raise such a claim for the first time on appeal. Professor Moore has suggested that Rule 12, which expressly preserves the right to raise claims of lack of jurisdiction and failure to charge an offense at any time, "may by negative implication be interpreted as foreclosing the other defense if not raised [before trial or] during the trial itself." 8 Moore's *Federal Practice* ¶1203[1], pp. 12–17 to 12–18 (2d ed. 1976); see 1 Wright, *Federal Practice and Procedure,* § 93, pp. 409–410 (2d ed. 1970) (interpreting former Rule 12); *United States* v. *Wild,*

tions (18 U.S.C. 3281) was convicted on non-capital lesser included offense subject to a 5-year period of limitation (18 U.S.C. 3282). No comparable exception is required by the facts of this case.

supra, 551 F. 2d at 424. Professor Moore specifically refers to limitations statutes in that regard, noting: "It seems clear at least that the defense of the statute of limitations should be raised no later than the trial." *Ibid.*

Where other statutory speedy trial rights have been conferred, Congress has made plain its intention to limit their exercise to prescribed times. Thus, claims under the Speedy Trial Act must be made before trial or plea. Section 3162(a)(2) (Supp. V), Title 18, specifically provides that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or *nolo contendere* shall constitute a waiver of the right to dismissal under this section."[40]

Requiring that statutory speedy trial claims be raised before conviction works no substantial hardship on defendants and promotes the orderly administration of justice. It is already well established that appellate courts "need not ordinarily consider grounds of objection not presented to the trial court" (*Anderson* v. *United States,* 417 U.S. 211, 217, n. 5). Although a limited exception has developed for errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings" (*United States* v. *Atkinson,* 297 U.S. 157, 160), that exception is not

[40] We recognize, of course, that Congress did not include a similar provision in the Interstate Agreement on Detainers Act. We do not regard that omission as indicating a different intent, however, in view of fact that the Agreement was adopted without change and without any evident awareness that it might apply to the United States as a receiving state.

applicable here. Respondent was given a full and fair opportunity to establish his innocence at trial.

Indeed, the Second Circuit itself has recently recognized that claims under the Agreement are not generally the sort of extraordinary claims that would justify collateral relief under 28 U.S.C. 2255. *Edwards* v. *United States,* No. 77–2048, decided October 25, 1977.[41] The court concluded that violation of the Agreement neither constituted "'a fundamental defect which inherently results in a complete miscarriage of justice'" nor presented "'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" Slip op. 126, quoting *Hill* v. *United States,* 368 U.S. 424, 428 (emphasis in original); see *Davis* v. *United States,* 417 U.S. 333, 346. Similar considerations should be relevant in determining whether respondent is entitled to relief under the Agreement on grounds not raised in the trial court. In view of the substantial expenditure of judicial resources that trial requires, and in view of the pressing demands for such resources imposed by the Speedy Trial Act, it is entirely reasonable to insist that defendants claim the benefits of a statutory speedy trial provision before they have been tried, convicted, and sentenced.

In this case respondent has neither offered a satisfactory explanation for his failure to mention the Agreement to the district court nor demonstrated any prejudice to his defense resulting from the delay of

[41] *Edwards* involved an alleged violation of Article IV(e), prohibiting return of a prisoner before trial.

his trial. The November 4, 1974, motion (App. 83–90) does not suggest that respondent had suffered any prejudice, and when his counsel later was asked about the grounds for the motion under the Sixth Amendment and the Southern District rules, he replied (App. 105): "It's really the length of time, in essence." If respondent in fact has suffered significant prejudice, he may still rely upon that fact in pursuing his Sixth Amendment claim (see *Barker* v. *Wingo, supra,* 407 U.S. at 532). That question remains open in the event of a remand in this case. See Pet. App. 5a, n. 4.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1977.

APPENDIX

INTERSTATE AGREEMENT ON DETAINERS

PUB. L. 91–538, §§ 1–8, DEC. 9, 1970, 84 STAT. 1397–1403

§ 1. Short title

That this Act may be cited as the "Interstate Agreement on Detainers Act".

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time

that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof

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ing the continuance of the term of imprisonment there is pending in any party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided,* That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, information, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent volun-

tarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he had lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the

prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. "Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had.

If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising

out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein

contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"Article VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"Article VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"Article VIII

"This arrangement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such

withdrawal takes effect, nor shall it affect their rights in respect thereof.

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Commissioner of the District of Columbia.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Commissioner of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

§ 8. Effective date

This Act shall take effect on the ninetieth day after the date of its enactment [Dec. 9, 1970].

U.S. GOVERNMENT PRINTING OFFICE: 1977

CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-52

UNITED STATES OF AMERICA,

Petitioner,

v.

RICHARD T. FORD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the United States participates in the Agreement on Detainers as a receiving and sending "state."

2. Whether, where the Government has actually filed a detainer, a writ of habeas corpus *ad prosequendum* subsequently issued for production of a state prisoner

constitutes a request for temporary custody under Article IV of the Agreement.

3. Whether the court below properly found that, on the facts of this case, respondent did not waive his claim under Article IV(c) of the Agreement on Detainers.

STATEMENT OF THE CASE

On October 11, 1973, respondent Richard T. Ford was arrested by the FBI in Chicago, Illinois, on warrants charging him with bank robbery and interstate flight to avoid confinement. The interstate flight warrant was dismissed but respondent was held by Chicago authorities for extradition to Massachusetts to face pending state charges of escape and assault (A. 74, 106-111). While incarcerated in Chicago, respondent submitted a letter to the United States Attorney for the Southern District of New York and to the United States District Court for the Southern District of New York in which he requested a prompt trial on the federal charges (A. 87-90). Before receiving a response, respondent was extradited to Massachusetts to stand trial on the state charges, and the federal warrant issued by the Southern District of New York charging him with bank robbery was lodged as a detainer in Massachusetts. On February 8, 1974, respondent pleaded guilty to the Massachusetts charges and was sentenced to concurrent terms of eight to ten years' imprisonment (A. 51, 74).

On March 21, 1974, a two-count indictment charging respondent with bank robbery was filed in the Southern

District of New York, and on March 25, a writ of habeas corpus *ad prosequendum* was issued to obtain custody of respondent for arraignment and until he was "discharged or convicted and sentenced on said indictment" (A. 1, 8). On April 1, 1974, respondent was arraigned, and that same day the Government filed a notice of readiness (A. 1, 12). Two days later, a superseding indictment was filed, charging respondent and one James P. Flynn with bank robbery and other crimes (A. 14-17). On April 15, 1974, respondent pleaded not guilty to the indictment. When Flynn failed to appear, a warrant was issued (A. 28-29).

During proceedings held on April 25, 1974, the court set May 28, 1974, as the date for commencement of trial. The Government requested that the trial not begin until that date so that it could locate co-defendant Flynn. While the court stated that the delay of one month was permissible since respondent was serving another sentence, it indicated its willingness to proceed with a severed trial of respondent on May 28th if the co-defendant were not found (A. 45-46).

On May 17, 1974, the Government requested the first of what was to become a long series of delays, moving to adjourn the trial for 90 days or until the co-defendant was apprehended, whichever came first, and supporting its request by a sealed affidavit (A. 48, 62).[1] Defense counsel objected to the de[illegible]reminded the court that respondent had requested [illegible]edy trial immediately after his arrest, and emphasized that [illegible]

[1] The co-defendant remained a fugitive, and was not located until long after respondent's trial.

federal detainer lodged against respondent in Massachusetts was imparing his eligibility for furlough and work release programs (A. 62-65).[2] Nevertheless, the Government's motion was granted, and a new trial date was set for August 21, 1974. On June 14, 1974, respondent was removed from federal custody and transferred back to Massachusetts (A. 65, 11).

In August, 1974, the case was reassigned from Judge Arnold Bauman to Judge Constance Baker Motley, following Judge Bauman's resignation from the bench. Almost immediately thereafter, without notice or explanation to the defense, the court postponed the trial date until November 18, 1974. The defense, which learned of the delay on or about August 16, 1974, subsequently noted its objection (A. 76, 85).

On November 1, 1974, the Government moved for yet another 90-day adjournment within which to apprehend the co-defendant, and again supported its motion by sealed affidavit (A. 71). In response, defense counsel moved to dismiss the indictment on the ground that respondent had been denied a speedy trial (A. 83). Again, respondent alleged that he was being prejudiced by denial of furlough privileges due to the federal detainer (A. 86). The court denied the defense motion and granted the Government its requested adjournment (A. 82, 91).

On the newly scheduled trial date, however, the district judge found herself engaged in a stock fraud trial and, over defense objection, postponed the trial until June 11, 1975 (A. 92-94), in apparent disregard of the Second Circuit's then-recent admonition that

[2] Argument on the motion was held on May 22, 1974 (A. 61).

calendar delay was no excuse for postponing a criminal trial and that in such cases the action should be assigned to a different judge [*United States v. Drummond*, 511 F.2d 1049, 1053 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975)]. In the following month, the Southern District announced a crash program for civil cases. When the prosecutor inquired whether this would affect the date of respondent's trial, the district judge, without notice to defense counsel, set a new trial date. Once again, after learning of the delay, the defense objected (A. 96, 102; Pet. App. 4a).

On August 8, 1975, the Government obtained a second writ of habeas corpus *ad prosequendum* (A. 98-99). The trial began on September 2, 1975. That day, respondent again moved to dismiss for failure to provide a speedy trial, and again called attention to the prejudice caused him in Massachusetts by the pending federal charges (A. 105). The motion was denied, and respondent was subsequently convicted of all counts. The district judge sentenced respondent to concurrent five year terms, with the recommendation that the terms be allowed to run concurrently with the Massachusetts state sentence respondent was already serving (A. 114).[3]

[3] On August 13, 1977, respondent was released on parole on his state sentence. The preceding day, he was released from federal custody on his own recognizance pending the disposition of this case after having served some 20 months of the sentence concurrently with the Massachusetts sentence. The motion and order granting release were certified as Supplemental Index "D", Doc. Nos. 41-43, to the record in the court of appeals.

On appeal, respondent argued that the delay in bringing him to trial violated the Southern District Plan for Prompt Disposition of Criminal Cases, the Sixth Amendment, and Articles IV(c) and IV(e) (the speedy trial and transfer provisions) of the Interstate Agreement on Detainers. On February 3, 1977, the court of appeals reversed. Without reaching respondent's Sixth Amendment or speedy trial rule claims, the court of appeals found a violation of Article IV(c) of the Interstate Agreement on Detainers, which mandates that trial be commenced within 120 days of receipt of the prisoner unless continuances are granted for good cause in open court, and accordingly ordered dismissal of the indictment (Pet. App. 1a-26a).

After a review of the history and purposes underlying the enactment of the Interstate Agreement on Detainers, aptly characterized by the dissenting judge as a "most learned and exhaustive treatise" (Pet. App. 26a), the court concluded that where the federal government has actually filed a detainer against a state prisoner, it invokes Article IV of the Interstate Agreement on Detainers when it produces the prisoner for trial by means of a writ of habeas corpus *ad prosequendum.* The court noted that to hold otherwise would vitiate operation of the Agreement "insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ. This, in turn, would impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (Pet. App. 20a). Writing for the majority, Judge Mansfield carefully distinguished this case from the circuit's then-recent opinion of *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert.*

granted, Sup. Ct. No. 76-1596, October 3, 1977, which held the sanctions of the Agreement applicable where no detainer was filed but where "the sole federal intervention is the issuance of a habeas writ," a decision from which Judge Mansfield had dissented (Pet. App. 19a).

After concluding that the Agreement applied, the court first rejected respondent Ford's claim that his transfer back to Massachusetts prior to trial violated Article IV(e) of the Agreement, which mandates that a defendant be tried before being returned to his original jurisdiction, holding that respondent had requested to be returned to Massachusetts and that such request waived his olaim under Article IV(e). Turning to Article IV(c), which requires that trial be held within 120 days, except for reasonable continuances granted in open court, the panel found that respondent had not waived this claim, that quite the contrary, he had repeatedly insisted upon a prompt trial. Finding that a number of the continuances were unjustifiable, in addition to having been granted outside respondent's presence, the court ordered dismissal of the indictment (Pet. App. 21a-26a). In dissent, Judge Moore took no issue with the majority's determination that the Agreement on Detainers applied, but disagreed with the majority's conclusion that the continuances were unnecessary and unreasonable (Pet. App. 26a-29a).

SUMMARY OF ARGUMENT

I. Despite the clear language of the Interstate Agreement on Detainers Act, which states that the Agreement applies in full to all participants, the Government maintains that Congress intended to exclude the federal government from participation when it obtains state prisoners for trial in federal courts or when prisoners in party states to the Agreement attempt to seek disposition of federal detainers. There is no valid basis for such an assertion.

First, under Article II of the Agreement, the federal government is defined without limitation as a "State." Second, Article VIII provides that the Agreement shall enter "into full force and effect" as to any State which enacts it into law. Third, Section 4 of the Act states that federal courts are "appropriate courts" for disposition of charges under the Agreement, which disposition can only be accomplished by courts of a "receiving state."

Apart from the unambiguous statutory language, the Act's legislative history confirms that Congress intended the federal government to participate as a receiving state. For example, a letter of the Assistant to the Commissioner of the District of Columbia, made a part of the legislative reports, specifically states that the Agreement will enable federal prosecutors to obtain state prisoners for trial. Moreover, a number of references in the reports take on meaning only if the Government participates in the Agreement as a receiving and sending state and, like the Agreement itself, the reports state that the Act is to apply in full to all party states.

The Government's assertion that the history of the writ of habeas corpus *ad prosequendum* and related matters show that the federal government did not abuse detainers and therefore had no need for participation in the Agreement as a "receiving state" is no substitute for analysis of the terms of the Agreement itself. The factual predicate underlying the assertion is also inaccurate. Prior to the adoption of the Agreement, federal detainers lodged against state prisoners actually constituted an enormous percentage of detainers filed. Further, although federal prosecutors often brought prisoners to trial via a writ of habeas corpus *ad prosequendum* prior to completion of their state sentences, it was universally assumed that only as a matter of comity did states honor the writ, and compliance with the writ was not always forthcoming. Because of these uncertainties, and because prior to *Smith v. Hooey*, 393 U.S. 374 (1969), the Sixth Amendment had not always been thought to require an effort to produce the prisoner, recourse to the writ was not always sought. It was to remedy these problems, as well as those which confronted either federal prisoners or state prosecutors, that the Agreement was drafted.

Nor do events subsequent to enactment of the Agreement support the Government's position. The sections of the Speedy Trial Act of 1974 which provide a means by which prisoners may clear detainers not only fail to conflict with the terms of the Agreement on Detainers but were drafted to complement the Agreement. The 1974 report on a bill not yet enacted and newly-proposed amendments, cited by the Government, are irrelevant as evidence of the intent of Congress in 1970 and, in any event, do not support the

position that the Government participates in the Agreement only as a sending state. Finally, since there has been no construction by any agency of the government with respect to the Interstate Agreement on Detainers Act, the Government's position as to the applicability of the statute is entitled to no more weight than the position of any other party.

II. The Government's argument that, notwithstanding the filing of a detainer, its subsequent obtaining of custody of respondent by a writ of habeas corpus *ad prosequendum* did not constitute a request under the Agreement is without basis. As the Government acknowledges, the writ is fully encompassed in the definition of "request for temporary custody" in the Speedy Trial Act, and it further concedes that the same definition in the Agreement may be interpreted as encompassing a writ of habeas corpus *ad prosequendum*. This construction is compelled by the Agreement's plain language and is necessary to effectuate its purposes. Acceptance of a contrary construction would vitiate the Agreement's operation with respect to federal detainers, and thus impair its entire operation.

III. There is also no basis for the Government's argument that respondent waived his speedy trial claim under Article IV(c) of the Agreement. The record demonstrates that respondent frequently claimed his right to a prompt trial and complained that he was being prejudiced as a result of the detainer. Respondent's objections clearly put the court on notice that delay was contested, and his complaints concerning the detainer track the very language of the Agreement. The Government's insistence upon a harsh and inflexible waiver rule is supported by neither the facts

of this case, the language of the Agreement, nor general principles of law.

I.

THE UNITED STATES PARTICIPATES IN THE AGREEMENT ON DETAINERS AS A RECEIVING AND SENDING STATE.

In 1970, Congress passed the Interstate Agreement on Detainers Act (18 U.S.C. App. at 4475-4478). The Act made the federal government a party to the Agreement on Detainers, a compact which was designed to alleviate the host of problems which occurred when one jurisdiction with a pending criminal charge filed a detainer against a prisoner in another jurisdiction, and to provide uniform and efficient procedures for disposition of the charge underlying the detainer. Article I.[4]

Article III of the Agreement provides the means by which a prisoner against whom a detainer has been lodged may secure disposition of the charges against him. Article IV specifies the method by which a prosecutor may secure custody for trial of an individual against whom a detainer has been lodged. Under Article IV(a), the authorities who wish to try a prisoner must submit a written request for temporary custody to the custodian in the jurisdiction where the prisoner is lodged. Under Article IV(c), a prisoner delivered pursuant to that request must be tried within 120 days

[4] The Agreement is set forth as section 2 of the Act.

unless extensions for good cause are granted in open court.

Here, the federal government, a party to the Agreement, lodged a detainer against respondent in Massachusetts, a party state. Pursuant to a request in the form of a federal writ of habeas corpus *ad prosequendum*, respondent was produced for trial. The trial, however, did not take place for another 17 months. The Government does not dispute that this delay violated the speedy trial provision of the Agreement. Rather, it argues that the Agreement was not designed to apply to the federal government when it secures a state prisoner or when a state prisoner seeks disposition of a federal charge.

This argument is made in the face of express language to the contrary in the Interstate Agreement on Detainers Act and in the absence of any support in its legislative history. Moreover, it is an argument which has been rejected by every circuit judge considering it.[5]

A. The Statute Itself.

As this Court has frequently stated, the "starting point in every case involving construction of a statute"

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[5] *United States v. Sorrell*, 562 F.2d 227, 232 n. 7 (3d Cir. 1977) (*en banc*) and *United States v. Thompson*, 562 F.2d 232, 234 (3d Cir. 1977) (*en banc*), 236 (WEIS, J., dissenting), 244 (GARTH, J., dissenting), *petition for cert. filed*, Sup. Ct. No. 77-593; *United States v. Kenaan*, 557 F.2d 912, 915 n. 6 (1st Cir. 1977), *petition for cert. filed*, Sup. Ct. No. 77-206; *United States v. Scallion*, 548 F.2d 1168, 1174 (5th Cir. 1977), *petition for cert. filed*, Sup. Ct. No. 76-6559; *United States v. Mauro*, *supra*.

is the language of the statute itself. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *United States v. Kahn*, 415 U.S. 143, 151 (1974). Indeed, where sufficiently clear in its context, the language of the statute is the primary determinant of Congressional intent. See, *e.g.*, *Ernst & Ernst v. Hochfelder*, *supra*, 425 U.S. at 201; *United States v. Oregon*, 366 U.S. 643, 648 (1961). Here, in effect, the Government concedes that there is no lack of clarity in the statutory language regarding the Government's role, since "the term 'state' in the Agreement is defined to include the United States and carries no disclaimer that the United States shall participate only as a sending state" (Pet. Br. at 17).

That Congress intended the federal government to be a full participant is the only plausible reading of the statute. Article II(a) of the Agreement provides that:

> 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"Sending State" is then defined as a state in which the prisoner is incarcerated at the time of his or the government's request for disposition [Article II(b)], and "Receiving State" is defined as the jurisdiction in which trial is to be had. Article II(c).

The absence, at the very outset of the Agreement, of any limitation with respect to the statutory language defining the United States as a state demonstrates the contemplation of Congress that the federal government's participation was not to be limited to that of a sending state.

Supplementing the clear language of Article II, Article VIII of the Agreement mandates that "[t]his agreement shall enter into full force and effect as to a party State when such State has enacted the same into law." Again, no limitation appears with respect to the United States.

That Congress intended the United States to be a full participant is also evident from its definition of the term "appropriate court" set forth in Section 4 of the Agreement on Detainers Act:

> The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, *in which indictments, informations or complaints, for which disposition is sought, are pending.* (Emphasis added.)

This term, which is used in Articles III, IV, and V of the Agreement,[6] refers exclusively to a court in a receiving state. Significantly, the Government's brief makes no effort to explain why Congress included a definition stating that federal courts in which indictments are pending – courts of a receiving state – are

[6] Article III(a) requires that the prisoner seeking disposition be tried within 180 days of the delivery of a request for disposition to the prosecuting officer and "appropriate court;" Article IV(b) requires that the state sending the prisoner for trial furnish the "appropriate courts" of the receiving state with notification of the request for custody; and Article V(c), the basis for dismissal in the instant case, provides that where temporary custody is not accepted, or trial is not had in accordance with Article III or IV, "the appropriate court" having jurisdiction of the indictment shall dismiss it with prejudice.

appropriate courts for disposition of such charges under the Agreement. The failure is not surprising, for it is inconceivable, if Congress had intended the federal government's participation to be limited to that of a sending state, that it would have included a definition which applies exclusively to the federal government's participation as a receiving state. The statutory language could not be clearer. The literal terms of the Agreement specify the federal government as a receiving as well as a sending state.

B. The Legislative History.

Contrary to the Government's argument, the legislative history of the Agreement on Detainers Act is fully consonant with its language. While claiming that Congress did not intend to apply the Agreement to the federal government as a receiving state, the Government is able to point only to the fact that a number of references in the brief legislative reports[7] advert to the government's participation as a "sending state" (Pet. Br. at 30-32). But none of those references cited confines federal participation to that capacity. Moreover, the Government has simply ignored statements in the legislative reports which speak to the federal government's participation as a receiving state.

[7] The Agreement was introduced in 1970, adopted by the Congress without opposition, and passed under suspension of the rules. 116 Cong. Rec. 13997-14000, 38840-38842 (1970). See H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. (1970).

For example, the letter of Graham W. Watt, Assistant to the Commissioner of the District of Columbia, included as part of the House and Senate reports, supported federal enactment of the Agreement in part because it would "entitle the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party State made available for disposition of such detainer." H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 4, 7 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 4, 7 (1970). This letter, which was before both Houses of Congress at the time the Act was passed, confirms that Congress was well aware that it was including the federal government as a receiving as well as a sending state.

Furthermore, a number of statements in the reports take on meaning only if Congress assumed that the federal government would participate both as a receiving and sending state. For example, in addressing the right of a prisoner to request disposition of the charges underlying a detainer and the receiving state's obligation to try that prisoner, the reports state:

> For this purpose the prosecutor can obtain temporary custody of the prisoner and take him to the jurisdiction in which trial is to be held. *In the case of a federal prisoner*, the prosecutor will be entitled to temporary custody as provided by the agreement or to the prisoner's presence in Federal custody at the place of trial, whichever arrangement may be approved by the custodian. H.R. Rep. No. 91-1018, *supra* at 2; S. Rep. No. 91-1356, *supra* at 2 (Emphasis added).

This limitation to "federal prisoners" in the second sentence can mean only that the preceding reference to "prisoners" encompasses federal and state prisoners alike. Yet, if the Agreement were intended to restrict the federal government to a sending state, involving only federal prisoners, this paragraph would make no sense.

Finally, as in the Agreement itself, there is specific language in the legislative reports which decrees full participation for all signatories:

> The agreement is open to participation by the United States of America and by the District of Columbia, as well as by each of the several States, the territories and possessions, and the Commonwealth of Puerto Rico.
>
> It is provided that the Agreement shall enter into full force and effect as to a party "State" when such State has enacted the same into law, and that any party may withdraw by enacting a repealer. H.R. Rep. No. 91-1018, *supra* at 3; S. Rep. No. 91-1356, *supra* at 3.

Consequently, not only is there nothing in the legislative history which supports the Government's view of limited federal participation in the Agreement, there is much that contradicts it.

C. The Detainer Problem and the Federal Government.

Unable to find language in the Act itself which states that the federal government was meant to participate only as a sending state, or to find specific evidence in the legislative history to that effect, the Government

embarks upon an historical review of the problems leading to enactment of the Agreement, and more generally of the writ of habeas corpus *ad prosequendum* which, it argues, demonstrates that the Agreement on Detainers was not designed to enable state prisoners to dispose of federal detainers, or federal prosecutors to request the production of state prisoners. Even if the Government's historical analysis were correct, it could not overcome both the clear terms of the statute and the legislative history before Congress. See *United States v. Bass*, 404 U.S. 336, 344 (1971). Moreover, the Government's presentation is less than accurate and furnishes no support for its ultimate conclusions.

The Government takes no issue with Judge Mansfield's exhaustive analysis of the problems which plagued prison administrators, judges, defendants, and prosecutors under the unregulated detainer system in use prior to the Agreement.[8] Nor does the Government

[8] Judge Mansfield's opinion catalogues the many abuses caused by this system. The existence of detainers adversely affected the terms and conditions of a prisoner's confinement, often rendering him ineligible for furloughs, minimum custody, or even parole; the pendency of a detainer hampered prison administrators in developing coherent rehabilitation programs and created difficulties for judges in sentencing; these uncertainties in turn affected the prisoner's ability to rehabilitate himself. A host of different problems were encountered by the inmate when he eventually had to prepare for trial, often far removed from potential witnesses. Despite the severe effects of detainers, virtually any law enforcement officer could file one, and in numerous instances, the only reason the detainer was filed was in an effort to increase the severity of the inmate's sentence. Indeed, it was estimated that as many as 50% of the detainers filed were allowed to lapse upon the prisoner's release. While one of the reasons for this system was the cumbersome nature of the

(continued)

deny that the Agreement on Detainers was designed to provide a comprehensive answer for these problems. Rather, the Government insists that state prisoners with outstanding federal charges did not suffer from the

(footnote continued from preceding page)

extradition process and the lack of uniform rules governing interjurisdictional transfer, another cause was that there was no incentive for prosecutors to attempt to secure custody of the inmate prior to the expiration of his sentence, since as late as the 1960's the rule in the majority of jurisdictions was that an inmate's right to a speedy trial was not violated despite the failure of the prosecution even to attempt to secure custody. See Pet. App. 8a-17a.

In addition to Judge Mansfield's opinion, there are innumerable cases and commentary on the problems posed under the detainer system. See, *e.g.*, *Pitts v. State of North Carolina*, 395 F.2d 182 (4th Cir. 1968); *United States ex rel. Giovengo v. Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961); *United States v. Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955); *Pellegrini v. Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955); *Barker v. Municipal Court*, 64 Cal.2d 806, 415 P.2d 809, 51 Cal. Rptr. 921 (1966); *People v. Kenyon*, 39 Misc. 2d 876, 242 N.Y.S.2d 156 (Schuyler Co. Ct. 1963); *State v. Milner*, 78 Ohio L. Abs. 285, 149 N.E.2d 189 (Ct. C.P. 1958); *Cane v. Berry*, 356 P.2d 374 (Okla. Crim. App. 1960); Yackle, *Taking Stock of Detainer Statutes*, 8 Loy. U.L. Rev. (LA) 88 (1975); Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L.J. 767 (1968); Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U. Cin. L. Rev. 179 (1966); Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417; Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. Chi. L. Rev. 535 (1964); Note, *Convicts – The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rut. L. Rev. 828 (1964); Bennett, *The Last Full Ounce*, 23 Fed. Prob. No. 2, at 20 (June 1959). See also the Seminar on the Detainer Problem in 9 Fed. Prob. No. 3, at 1-19 (July-Sept. 1945).

abuses of the detainer system, because the Government "had long been able to obtain state prisoners by writ of *habeas corpus ad prosequendum* . . . because the Sixth Amendment required speedy trial on federal charges," and because it does not appear "that the federal government had traditionally abused the detainer system" (Pet. Br. at 16-17, 12). The historical evidence indicates quite the contrary.

While there are no comprehensive statistics on the number of detainers filed by the federal government, available research indicates that the government filed a large percentage of all detainers outstanding and that the "number of detainers which flow between the federal government and any given state far outnumber those between a given state and any other state." Note, *Convicts – The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rut. L. Rev. 828, 856 (1964).

For example, in 1944, in a Michigan prison, federal detainers accounted for 46 out of 109 detainers filed.[9] Between January and June 1962, of 222 out-of-state detainers filed in California, the federal government accounted for 70.[10] In 1963, in a major Illinois prison, of 96 detainers filed, 52 were filed by federal officers.[11] The sheer number of federal detainers – a number totally "disproportionate"[12] to the amount of federal

[9]Heyns, *The Detainer in a State Correctional System*, 9 Fed. Prob. No. 3, at 13, 15 n. 1 (July-Sept. 1945).

[10]Note, *Convicts – The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rut. L. Rev. 828, 856 n. 238 (1964).

[11]Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. Chi. L. Rev. 535, 540 (1964).

[12]Comment, 31 U. Chi. L. Rev., *supra* n. 11, at 540.

litigation as compared with the states – was seen as a problem by state officials.[13]

Moreover, prisoners sought by federal authorities were not immune from the abuses of the detainer system. As one state correctional official noted:

> There have been incidents, fortunately rare, where Federal judges or prosecuting attorneys have filed warrants against a committed defendant for the sole purpose of preventing parole consideration in his case. Bates, *The Detained Prisoner and His Adjustment*, 9 Fed. Prob. No. 3, at 16, 17 (July-Sept. 1945).

The degree to which the government abused the system is not nearly as relevant as is the fact that it participated in the system and that there were abuses.

Further, the history of the writ of habeas corpus *ad prosequendum* furnishes little support for the Government's view that prior to adoption of the Agreement it was operating under a fully satisfactory system of obtaining custody of state prisoners and, therefore, that Congress could not have intended to alter the system when it enacted the Agreement.

While the writ has been available since the enactment of the Judiciary Act of 1789 [*Ex Parte Bollman*, 4 Cranch 75 (1807)], and was used to secure custody of federal [*Ponzi v. Fessenden*, 258 U.S. 254, 261 (1922)] and state prisoners, the unchallenged view[14] until quite recently was that, with respect to state prisoners, the writ was only a request and was unenforceable against

[13]See Heyns, 9 Fed. Prob. No. 3, *supra* n. 9, at 14.

[14]This Court specifically reserved the question in *Carbo v. United States*, 364 U.S. 611, 621 n. 20 (1961).

the states. This was premised both on the notion that Congress had never intended the writ to compel production of a lawfully incarcerated state prisoner[15] and upon concepts of comity and exhaustion of jurisdiction articulated in *Ponzi v. Fessenden, supra*, 258 U.S. at 260-261:

> The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control,

[15]See Comment, 31 U. Chi. L. Rev., *supra* n. 11, at 541; Yackle, *Taking Stock of Detainer Statutes*, 8 Loy. U.L. Rev. (LA) 88, 96 & n. 56 (1975). This view rested upon the interpretation of the original Judiciary Act in *Ex Parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845), where the Court, holding itself powerless to issue a writ of habeas corpus *ad subjiciendum* against an individual incarcerated in state prison, stated:

> As the law now stands, an individual, who may be indicted in a circuit court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under authority of a State.

As the Court noted in *Carbo v. United States, supra*, 364 U.S. at 615-617, subsequent to the first Judiciary Act, there were several revisions of the habeas corpus statute. However, none of the revisions was intended to alter the writ of habeas corpus *ad prosequendum*. While the writ was for the first time specifically included by name in the 1948 revision of the Judicial Code, that revision was specifically undertaken only "with changes in phraseology necessary to effect the consolidation." Specifically disclaimed was any intent to change the law of habeas corpus. *Id.* at 619. Thus, if the language in *Dorr* and the interpretation of the subsequent history in *Carbo* are correct, Congress has never authorized the writ to run against state prisoners.

> before the other court shall attempt to take it for its purpose.
>
> * * *
>
> ". . . between State courts and those of the United States it is something more . . . a principle of right and law, and therefore, of necessity. . . . These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty." (Citation omitted.)[16]

On the basis of this oft-repeated language, and prior to Judge Mansfield's dissent in *Mauro*, the federal courts adhered universally to the proposition that the production of a state prisoner in federal court via a writ of habeas corpus *ad prosequendum* is accomplished only as a matter of comity between two sovereigns, and that a federal court by issuance of the writ could not compel production of a state prisoner. See, *e.g.*, *McDonald v. Ciccone*, 409 F.2d 28 (8th Cir. 1969);

[16]*Ponzi* involved the question of whether the federal government could "loan" one of its prisoners for trial in a state. While the language in the above case, which held that as a matter of comity the federal government might "loan" its prisoners for trial, was thus uttered in the context of state power to require production of a federal prisoner, the all-embracing language of the opinion was not limited solely to that question and it has not been so limited in cases construing it. See pp. 23-25, *infra*.

United States v. Perez, 398 F.2d 658, 660 (7th Cir. 1968), *cert. denied*, 393 U.S. 1080 (1969); *United States ex rel. Moses v. Kipp*, 232 F.2d 147, 150 (7th Cir. 1956); *Gordon v. United States*, 164 F.2d 855, 861 (6th Cir. 1947), *cert. denied*, 333 U.S. 862 (1948); *Stamphill v. Johnson*, 136 F.2d 291 (9th Cir.), *cert. denied*, 320 U.S. 766 (1943); *Lunsford v. Hudspeth*, 126 F.2d 653 (10th Cir. 1942); *Zerbst v. McPike*, 97 F.2d 253 (5th Cir. 1938); *United States ex rel. Brown v. Malcolm*, 350 F. Supp. 496, 499 n. 9 (E.D.N.Y. 1972); *Carlton v. United States*, 304 F. Supp. 818, 822 n. 2 (E.D. Ark. 1969); *Wzesinski v. Amos*, 143 F. Supp. 585, 587 (N.D. Ind. 1956); Annot., 5 L. Ed. 2d 964, 967 (1960). Indeed, consent was not always given. See *United States v. Perez, supra*, 398 F.2d at 660 ("Warden specifically stated that the Arkansas authorities would not comply with such a writ"); *Gordon v. United States, supra*, 164 F.2d at 860 (Ohio warden refuses to produce two co-defendants for trial despite issuance of habeas writ); *Wzesinski v. Amos, supra*, 143 F. Supp. at 587 (federal court unable to issue writ since Indiana legislature "has specifically forbidden the removal of any life convict from any of its prisons for sentence or trial except for treason or first degree murder"); *United States v. Cartano*, 420 F.2d 362, 364 (1st Cir.), *cert. denied*, 397 U.S. 1054 (1970) (writ returned unsatisfied when prisoner incarcerated in prison mental hospital).

In the context of this case, the significance of this body of law is not whether its underlying assumptions were correct, but rather that it reflected the universal perception of the issue by courts and prosecutors [see, *e.g., Strand v. Schmittroth*, 251 F.2d 590, 598 (9th

Cir.), *cert. dismissed*, 355 U.S. 886 (1957)] in the period leading up to enactment of the Agreement. The result of this perception is that, prior to the Agreement, the writ of habeas corpus *ad prosequendum* was not the fully satisfactory system of securing custody portrayed by the Government.[17]

The Government's further assertion that, prior to *Smith v. Hooey*, 393 U.S. 374 (1969), state prisoners with federal charges were receiving expeditious trials under the Sixth Amendment ignores the restrictive interpretation of that amendment prevailing at the time. A number of courts held that because a state could refuse to honor a request for custody, the Sixth Amendment did not require an attempt to secure custody. *Nolan v. United States*, 163 F.2d 768 (8th Cir. 1947), *cert. denied*, 333 U.S. 846 (1948); *United States v. Jackson*, 134 F. Supp. 872 (E.D. Ky. 1955). Other courts denied relief to state prisoners under the Sixth Amendment on the ground that it was the prisoner's own fault if he was incarcerated in another jurisdiction. *Morland v. United States*, 193 F.2d 297, 298 (10th Cir. 1951); *United States v. Fouts*, 166 F. Supp. 38, 42 (S.D. Ohio), *aff'd.*, 258 F.2d 402 (6th Cir.), *cert. denied*, 358 U.S. 884 (1958). Consequently, in many instances, federal prosecutors would allow a state sentence to lapse before bringing a prisoner to

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[17] As one commentator concluded, after noting that the federal government could not compel compliance with the writ:

> [D]isposition of the underlying charge must come through the cooperation of the jurisdictions affected. *The Agreement on Detainers is a legislative attempt to achieve just that cooperation.* Yackle, *supra* n. 15, 8 Loy. U.L. Rev. (LA) at 96-97. (Emphasis added.)

trial on federal charges. See, *e.g.*, *United States v. Lebosky*, 413 F.2d 280 (3d Cir. 1969), *cert. denied*, 397 U.S. 952 (1970); *Morland v. United States, supra*, 193 F.2d 297; *United States v. Fouts, supra*, 166 F. Supp. 38; *Wzesinski v. Amos, supra*, 143 F. Supp. 585. While other federal cases in the 1950's and 1960's required the federal government, under the Sixth Amendment, to attempt to secure the defendant prior to expiration of the state sentence [see, *e.g.*, *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1956)], the issue was not finally settled until *Smith v. Hooey*. See *United States v. Lebosky, supra*, 413 F.2d at 281-282 ("existing case law as to the government's duty, if any [prior to *Smith*], was far from clear").

Thus, both at the time the Agreement was drafted, as well as when it was passed, the federal government's involvement in the overall detainer problem was similar to that of the states: detainers were often filed and not disposed of easily, while rendition proceedings were fraught with uncertainty.[18]

It is not surprising, therefore, that in 1956, when the Council of State Governments sponsored a conference to review and approve the draft agreement, federal involvement was sought and representatives of the

[18]In fact, the method by which state authorities obtained federal prisoners was little different from the means used by federal prosecutors to obtain state prisoners. In either case, the jurisdiction would issue a writ of habeas corpus *ad prosequendum*, which although normally honored, was honored as a matter of comity. See *Smith v. Hooey, supra*, 393 U.S. at 381 & n. 13.

Department of Justice participated in the meeting.[19] The Agreement which resulted specifically provided for unlimited federal participation as a "state." Indeed, in its commentary on the final draft of the Agreement, the Council confirmed that this participation was meant to be as both a receiving and sending state:[20]

> This proposal, including an appropriate enabling act, carries into effect the right of the prisoner to initiate disposition of detainers based on untried indictments, informations or complaints *arising in other states or from the federal government.* It also provides a method whereby prosecuting officials may initiate such action. Council of State Governments, *Suggested State Legislation Program for 1957* 76 (1956) (Emphasis added).[21]

[19]See Council of State Governments, *Suggested State Legislation Program for 1957* 76 (1956). The first discussions concerning the possible drafting of a model agreement occurred in 1948. In 1955 and 1956 the Joint Committee on Detainers, first convened in 1948, was reconstituted under the auspices of the Council of State Governments. Meetings of the group, composed of members of the Parole and Probation Compact Administrators Associations, National Association of Attorneys General, National Conference of Commissioners on Uniform State Laws, American Prison Association, the Section on Criminal Law of the American Bar Association, the National Probation and Parole Association, and the National Association of County and Prosecuting Attorneys, were held to produce a draft agreement in 1955 and 1956. Following the conference held on April 14, 1956, which the Justice Department attended, the agreement was approved for submission to the states. *Id.*, at 74-76.

[20]The Government concedes that these materials are part of the Agreement's legislative history (Pet. Br. at 30 n. 24).

[21]In fact, federal participation in the Agreement was considered of sufficient magnitude that some state legislators maintained that federal participation in the Agreement itself would render their participation worthwhile. See *1957 New York State Legislative Annual* 42 (1957).

In sum, the history of events leading to Congress' adoption of the Agreement, contrary to the Government's argument, in no way contradicts the specific language of the Agreement, which declares that the federal government is a full party.[22]

Finally, analysis of the terms of the Agreement demonstrates that the problems which the Government claims would be caused by reading the Agreement as written do not exist. The principal Government assertion is that a literal reading of Article IV(a), which provides that after receipt of a request for temporary custody by appropriate state authorities there shall be a 30-day period within which the Governor may disapprove the request for temporary custody, is inconsistent with the mandatory nature of the writ (Pet. Br. at 32-34, 49). The argument misconstrues section IV(a). The drafters' comments make abundantly clear that the section was designed merely to preserve any existing rights to refuse extradition extant prior to the Agreement, not to create any new ones. See *Suggested State Legislation, supra* at 79 ("The possibility [of refusal] is left open merely to accommodate situations involving public policy which occasionally

[22]The Government's argument that federal participation was secured as a result of this Court's decisions in *Smith v. Hooey, supra*, and *Dickey v. Florida*, 398 U.S. 30 (1970), also ignores that in 1968, before *Smith* and *Dickey* were decided, the House of Representatives unanimously passed the Interstate Agreement although the Senate failed to act. See H.R. Rep. No. 91-1018, *supra* at 1.

have been found in the history of extradition.").[23] Thus, as the court below noted, even if the writ is mandatory, there is no conflict between Article IV, properly read, and the writ (Pet. App. 19a-20a).

In any event, even if Article IV(a) is construed in the hypertechnical fashion suggested by the Government, it would be unreasonable to take the "hypothetical and possibly non-existent conflict" resulting thereby between Article IV(a) and the writ, "and use it as the touchstone for an interpretation that would vitiate its operation insofar as it affects federal detainers" (Pet. App. 20a). The court of appeals' conclusion that Article IV(a) be construed in light of the overall language and purposes of the Agreement is firmly based. See *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 631-632 (1973).[24]

[23]In preserving existing rights, Article IV(a) is similar to the transfer provision of the Speedy Trial Act [18 U.S.C. §3161(j)(4)], whose applicability the Government concedes. That provision specifies that upon receipt of a request for temporary custody, the prisoner shall be turned over to the Government "subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery."

[24]The Government also argues that the "no return" provision of Article IV(e) would frustrate a prisoner's rehabilitation by forcing him to remain in a federal facility rather than permitting his return to a nearby state facility (Pet. Br. at 34). The simple answer is that the prisoner is free to waive the protection of this section, precisely what the court of appeals found to have occurred here. Finally, the Government's argument that Article IV(e) [or IV(c)] mandates that when the United States requests temporary custody on a single charge, all prosecutions in the United States must be undertaken before the prisoner is returned to the sending jurisdiction (Pet. Br. at 33) misreads the Agreement. There is no such command in Article IV.

D. The Speedy Trial Act and "Subsequent Administrative Interpretation."

The Government also argues that subsequent actions by Congress – particularly passage of the Speedy Trial Act of 1974 – demonstrate Congress' understanding that the Government's participation in the Agreement was limited. While this claim is again a poor substitute for analysis of the explicit terms of the Agreement [see *United States v. Bass, supra*, 404 U.S. at 344], the materials relied on by the Government, in fact, are consistent with full federal participation.

1. On January 3, 1975, the Speedy Trial Act was enacted into law.[25] 18 U.S.C. (Supp. V) §3161 *et seq.* In addition to detailed time limits, exclusions and sanctions involving the commencement of federal trials, the Act includes a brief section dealing with the transfer of a prisoner charged with a federal offense serving a "term of imprisonment in any penal institution." 18 U.S.C. §3161(j). The Act requires that the Government Attorney who has filed a charge either produce the prisoner for trial or lodge a detainer. Where a detainer is lodged, the prisoner must be informed of the charge and, if he requests trial, the request must be

[25]The form of the bill, as first passed by the Senate after some three years of hearings and debate, contained time limits for commencing federal criminal trials but no language governing the interjurisdictional transfer of a prisoner. See S. Rep. No. 93-1021, 93rd Cong., 2d Sess. 25-28 (1974). Only following Senate passage of the bill, and House Subcommittee hearings, was a section dealing with the transfer of a prisoner charged with a federal offense added. H.R. Rep. No. 93-1508, 93rd Cong., 2d Sess. 34-36 (1974).

forwarded to the government. When such request is received by the United States Attorney, he must, in turn, deliver to the custodian a "properly supported request for temporary custody." 18 U.S.C. §3161(j)(4).

The Government's argument is that these provisions are redundant with the Agreement on Detainers and demonstrate that the Agreement does not apply to the federal government (Pet. Br. at 37-41). Analysis of the source of the transfer provisions demonstrates that the argument is without basis.

As the legislative history of the Speedy Trial Act explicitly declares, the Act's transfer provisions were adopted almost verbatim from section 3.1 of the ABA's Standards Relating to Speedy Trial [ABA Project on Standards for Criminal Justice (Approved Draft, 1968)]. H.R. Rep. No. 93-1508, 93rd Cong., 2d Sess. 34 (1974).[26] The Commentary to the ABA Standards specifically refers to the Interstate Agreement on Detainers and finds in it a means for implementing the Standards.

For example, Section 3161(j)(4) of the Act provides that upon receipt of a demand for temporary custody, the prisoner shall be made available to the prosecuting authority. This section is identical to Section 3.1(d) of the Standards which is explained in the Commentary in the following way:

> This subsection merely states the general responsibility of the incarcerating authorities to make the prisoner available upon proper demand.

[26]The ABA Standards and Commentary are set forth as an appendix to the House Subcommittee Hearings. *The Speedy Trial Act of 1974: Hearings Before Subcomm. on Crime of the House Comm. on Judiciary*, 93rd Cong., 2d Sess. 499, 542-550 (1974).

> See Article V(a) of the Interstate Agreement . . .. No attempt is made in the standard to spell out all of the details on transfer of and responsibility for custody in cases where more than one jurisdiction is involved. *They are set out in detail in Article V of the Interstate Agreement.* ABA Standards, *supra* at 38. (Emphasis added.)

In similar fashion, the ABA Standard requiring the custodian to notify the Government Attorney of a prisoner's demand for trial [§3.1(b), enacted as §3161(j)(2)] and the Standard requiring the prosecutor to attempt to obtain custody of the prisoner [3.1(c), enacted as §3161(j)(3)] both explicitly state that the procedures outlined in the Interstate Agreement on Detainers are appropriate means of carrying out the general language of the Standards.[27] The only section of the Standards which does not rely on the Agreement, §3.1(a), enacted as §3161(j)(1) of the Act, requiring the prosecutor to lodge a detainer or produce a prisoner, was designed to remedy a defect perceived in the Agreement on Detainers: that an inmate with a pending charge not reflected by a detainer had no right under the Agreement to force disposition of the charge. See ABA Standards, *supra* at 34. In no sense can this provision be deemed to conflict with the Agreement. Consequently, the materials before Congress when the Speedy Trial Act was passed in fact demonstrate that

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[27]ABA Standards, *supra* at 35 ("No attempt is made in the standard to set forth a precise procedure as to how this is to be done, although the specific procedures set forth in the Uniform Act and the Interstate Agreement would appear appropriate."), 36 ("[I]f the incarcerating state is also a party to the Interstate Agreement, a written request in compliance with Article IV(a) of the Agreement would be in order.").

the custody procedures adopted by the Congress were fully compatible with the Agreement on Detainers.[28]

The Government's argument is also not strengthened by variations between the time limits or conditions in the Speedy Trial Act – the sanctions of which will not even become effective until 1979 – and those in the Interstate Agreement on Detainers. The variances are attributable to the differences in purposes between the two statutes.

The conditions of the Interstate Agreement on Detainers such as the transfer-back provision [Articles III(d) and IV(e)] apply to a particular class of cases in those jurisdictions which have enacted an Agreement which is concerned with the effect of detainers on prisoners' rehabilitation as well as with the necessity of providing a speedy trial. If Congress sets different time limits – either more or less stringent – for federal trials, that action does not constitute a repeal of the Agreement any more than the enactment of state speedy trial rules not identical with the Agreement can be viewed to have repealed that state's participation.

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[28]Moreover, although the House Legislative Report on the Speedy Trial Act – the only source discussing the Act's custody provision – has no explicit reference to federal participation in the Agreement on Detainers as either a sending or receiving state, it recognizes the existence of compacts such as the Agreement and reaffirms adherence to existing law in that regard:

> In preserving the defendant's right to challenge the legality of his being surrendered by the custodial authority, *the Committee does not intend in any way to change existing law with respect to extradition or transfer of and responsibility for custody in cases where more than one jurisdiction is involved.* H.R. Rep. No. 93-1508, *supra* n. 25, at 36 (Emphasis added).

Finally, even if the Acts are regarded as partially redundant – a proposition we dispute – that alone would not be sufficient to override the express language of the Agreement on Detainers Act. As this Count noted in *United States v. Bass, supra*, 404 U.S. at 344:

> While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional law-making.

2. The two other examples cited by the Government as evidence of Congress' belief in the limited government role under the Agreement (see Pet. Br. at 41-42) require only brief response. First, that there are currently pending amendments which, if enacted, will provide for federal participation in the Agreement as a sending state for purposes of Articles III and IV, but as a receiving state only as to Article III, is more an admission that there is at present no qualification on the government's participation in the Agreement than it is evidence that federal participation is limited. Nonetheless, these amendments do not adopt the construction of the Agreement urged by the Government, since they recognize that at least for purposes of Article III, the federal government participates both as a sending and receiving state. See S. 1437, 95th Cong., 1st Sess., Section 3201 (1977); H.R. 6869, 95th Cong., 1st Sess., Section 3201 (1977).

Equally irrelevant is the Government's citation to a draft of a Senate Judiciary Committee Report on S.1, 94th Cong., 1st Sess. (1975), a bill never passed, which expressed an opinion that a previous Congress, in enacting the Agreement on Detainers, had not intended

to limit the writ of habeas corpus *ad prosequendum*. Even assuming that affirmance of the court below would limit the writ, a position we dispute (see pp. 28-29, *supra*), the report is entitled to no weight, for it is well established that the opinions of members of Congress expressed subsequent to passage of a statute cannot alter the intent of the Congress which enacted it. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); see *United States v. S.W. Cable Co.*, 392 U.S. 157, 170 (1968); *United States v. Wise*, 370 U.S. 405, 411 (1962).

3. The Government's argument that, as an agency charged with administration of the statute, its own interpretation of the Act is entitled to "considerable weight" (Pet. Br. at 36) is also without merit.

First, there has been no expressly articulated construction by any agency of the federal government with respect to this legislation. The Government's argument that its failure to act is equivalent to the adoption of a definitive construction has been rejected time and again by this Court. *E.g., Baltimore & O.R.R. v. Jackson*, 353 U.S. 325, 330-331 (1957); *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 590 (1957); *Investment Co. Institute v. Camp*, 401 U.S. 617, 627 (1971). Nor are the present rationalizations of the Solicitor General the equivalent of an agency construction. *Investment Co. Institute v. Camp, supra*, 401 U.S. at 628.

Second, it is not at all clear that the government "enforces" or "administers" Article IV of the Agreement. The sanctions for violation of Article IV of the Agreement are enforced by the courts, not the Justice Department, and while the Department may

make use of a request for temporary custody it no more "administers" such a request under Article IV than it administers the writ of habeas corpus *ad prosequendum.*[29] But even if the Government administers the statute, and its position is the equivalent of an agency construction, that position is still of no consequence unless this Court also finds it consistent with the language of the statute and with the Congressional purpose in enacting it. *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). And, since the Government's argument is completely inconsistent with both the language and purpose of the Agreement, it is entitled to no weight.

In sum, analysis of the terms of the Agreement on Detainers Act, its legislative history, and events leading up to its passage, overwhelmingly sustains the court of appeals' conclusion that Congress intended the federal government to participate both as a sending and receiving state. While the Justice Department may be discontent with the language of the statute, its relief must come from Congress, not this Court.

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[29]The cases cited by the Government are inapposite. As an example, *Perkins v. Matthews*, 400 U.S. 379 (1971), involved the Voting Rights Act, enforcement of which was specifically entrusted to the Attorney General by the requirement of submission of plans for his approval. Similarly, *Johnson v. Robison*, 415 U.S. 361 (1974), involved an express opinion by the Board of Veteran's Appeals concerning its jurisdiction to decide constitutional questions under the Veteran's Act. Here, the Government has no enforcement power similar to that which it has under the Voting Rights Act, nor does it have the kind of adjudicative role as in *Johnson*.

II.

WHERE THE GOVERNMENT HAS ACTUALLY FILED A DETAINER, A WRIT OF HABEAS CORPUS *AD PROSEQUENDUM* SUBSEQUENTLY ISSUED FOR PRODUCTION OF A STATE PRISONER CONSTITUTES A REQUEST FOR TEMPORARY CUSTODY UNDER ARTICLE IV OF THE AGREEMENT ON DETAINERS.

The Government argues that despite its lodging of a detainer against respondent, its subsequent request for custody did not constitute a request under the Agreement on Detainers because the Government chose to denote the means of securing custody a writ of habeas corpus *ad prosequendum.* The court below properly rejected this argument for not only does it contravene the language of the statute, but to credit it, as Judge Mansfield observed, would "stand the Act on its head" (Pet. App. 19a).

Article IV of the Agreement provides that an officer of the jurisdiction in which a charge is pending shall be entitled to have a prisoner "against whom he has lodged a detainer" made available upon presentation of a "written request for temporary custody." Article IV(a). Here, the Government actually lodged a detainer against respondent, and produced him for custody from Massachusetts via a request denoted a writ of habeas corpus *ad prosequendum.* Despite the Government's concession that the term "request" may be interpreted as including a habeas writ, it argues that it should not be so construed because "the terms of the statute and its legislative history compel the opposite result" (Pet. Br. at 48).

Nothing in the statute warrants such an assertion. While the Government again argues that the term "request" is inconsistent with the mandatory language of a writ, it ignores both that when the Agreement was enacted the writ was interpreted with respect to the states as no more than a request, and that, as the court below found, Article IV(a) was not designed to diminish whatever power to compel production is inherent in the writ (Pet. App. 19a-23a).

Moreover, adoption of the Government's argument would lead to the anomaly that the same term "request for temporary custody" in the Speedy Trial Act, which the Government concedes includes a writ of habeas corpus *ad prosequendum* (Pet. Br. at 48 n. 35), means something entirely different when used in the Interstate Agreement. Yet the Government offers no justification for this reading but to say that the provisions of the Speedy Trial Act, unlike the Agreement, were designed "to have broad applicability." (*Id.*) Such a distinction is completely unfounded. The materials before Congress at the time the Agreement was passed and the language of the Agreement demonstrate that it was designed to apply with "full force and effect." Moreover, the interrelationship between the Speedy Trial Act and the Agreement is clearly evinced by the Commentary to the ABA Standards upon which the transfer provisions of the Speedy Trial Act are based.[30]

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[30]The Commentary specifically refers to a "request" under the Agreement as a proper means for requesting custody under the ABA Standards in interjurisdictional transfers, and also notes that the Interstate Agreement provides the detail for transfer and custody provisions in those cases involving more than one jurisdiction (see pp. 31-33, *supra*).

Apart from the Speedy Trial Act, even a brief analysis of the purposes of the Agreement compels the conclusion that where the government files a detainer, its subsequent obtaining of the prisoner is by a request under the Agreement. As previously discussed (pp. 13-30, *supra*) the Agreement was designed, for federal and state prisoners alike, to provide uniform procedures to alleviate the multiplicity of problems posed by the effect of detainers upon prisoners, parole authorities, prosecutors, and judges.

"[T]o encourage the expeditious and orderly disposition" of charges underlying detainers (Art. I), the drafters included two complementary procedures. Under Article III, the prisoner may demand disposition of the charges. Under Article IV, the prosecutor initiates disposition of the charges. In either situation, the Agreement requires that trial be expeditiously concluded. As the court below noted:

> In part the limitations imposed by Article IV constitute necessary corollaries to those imposed by Article III, since without Article IV limitations prosecutors would be able to avoid the limitations under Article III merely by arraigning the prisoner without any intention of granting a prompt trial, thereby circumventing the requirements of the Agreement." (Pet. App. 18a)

This case exemplifies the wisdom of Judge Mansfield's conclusion and the correct application of the statute. The detainer lodged against respondent was unresolved for almost two years. Despite persistent requests for a prompt trial, almost 18 months passed between arraignment and trial. That respondent was denied certain rehabilitative benefits was never contradicted by the Government. And the delay, in fact,

deprived respondent of the opportunity to serve a greater portion of his federal sentence concurrently with his state sentence.

To treat the writ other than as a temporary request for custody would permit the Government, after burdening a defendant with a detainer, to circumvent the minimal requirements of the Agreement by the designation on its custody request. Such an interpretation would, as the court below found, "vitiate its [the Agreement's] operation insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ. This, in turn, would substantially impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (Pet. App. 20a). Moreover, it would run expressly counter to the guidelines set forth in Article IX that the Agreement be construed liberally to effectuate its purposes.

The Government's argument is also premised on a misreading of the opinion below. The court did not hold, as the Government suggests, that "Congress intended to condition further use of the writ upon compliance with Article IV of the Interstate Agreement on Detainers" (Pet. Br. at 47), nor does the court's reasoning warrant a conclusion that Congress has repealed the writ. Rather, Judge Mansfield's opinion applies the Agreement only in those cases where the government in fact lodges a detainer, thereby triggering the very problems the Agreement was designed to eliminate. Whether, in the absence of a detainer, the Agreement applies, whether in such a case the writ may be used without reference to the Agreement, or whether the writ itself constitutes a detainer, making

the Agreement the exclusive means of producing a prisoner, are questions presented not by this case but by *United States v. Mauro*, where no detainer was filed. The substantial difference between the two cases is attested to by the fact that Judge Mansfield, who wrote the opinion below, dissented in *Mauro*, and that courts which reject *Mauro* have consistently maintained that where the government files a detainer, it is bound by the Agreement. *United States v. Kenaan, supra*, 557 F.2d at 915 n. 6 ("Were we required to decide the question, we would, on this record, conclude that the United States participates as both a sending and a receiving State and that when it lodges a detainer, as it did in *Cyphers, Ford*, and *Sorrell*, . . . the United States must comply with the Agreement."); *United States v. Scallion, supra*, 548 F.2d at 1174;[31] see also *United States v. Ricketson*, 498 F.2d 367 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974).

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[31]The Government points to language in the legislative history, cited by the court in *Scallion, supra*, 548 F.2d at 1171, to the effect that Article IV is "a" means whereby prosecutors may obtain the presence of a prisoner serving a term of imprisonment as evidence that other means – a habeas writ, for example – were not precluded. Even if this phrase is given the meaning now sought by the Government, it does not support the position that a habeas writ is never a request under the Agreement. Indeed, if *United States v. Scallion* and *United States v. Kenaan* are correct, a writ of habeas corpus *ad prosequendum* may be used without reference to the Agreement where no previous detainer has been filed by the government. This result is consistent with the determination of the court below and with *United States v. Sorrell, supra*, where detainers were filed, and with the language of the legislative report that the Agreement is "a" means to secure custody where the government has untried charges.

III.

THE COURT BELOW PROPERLY FOUND THAT ON THE FACTS OF THIS CASE RESPONDENT DID NOT WAIVE HIS CLAIM UNDER ARTICLE IV(C) OF THE AGREEMENT ON DETAINERS.

Despite respondent's repeated protestations over the delay in his trial and his specific allegations that the detainer was causing him irreparable prejudice, the Government claims that his failure to invoke specifically the Agreement on Detainers constitutes a waiver. This argument, unsupported by the facts of this case, the language of the statute, or general principles of law, was correctly repudiated below.

From the very outset of this case, the record attests to respondent's effort to secure a prompt trial and to eliminate the prejudice caused by the pendency of the federal detainer. Almost immediately after he was arrested, and before he was represented by counsel, he wrote to the United States Attorney requesting a trial as soon as possible. In May, 1974, he objected to the first 90-day continuance sought by the Government and, through counsel, alleged that the federal detainer was rendering him ineligible for certain rehabilitative programs. Although not permitted to be present when the case was reassigned and postponed, he communicated his objection to the delay. Following the Government's motion in November, 1974, for yet another adjournment, he moved to dismiss the indictment, again alleging he was prejudiced by denial of furlough opportunities caused by the detainer. When on February 18, 1975, yet another continuance was

granted, counsel repeated his objection. Although not consulted or allowed to be present when the final three-month delay was ordered by the court, respondent once again pressed his objection and moved to dismiss (A. 64, 84-90, 93-94, 102, 105).

By these persistent objections, the court was clearly on notice that any delay was against respondent's wishes. Respondent's specific reference to the prejudice caused by the detainer not only placed clearly before the court the substance of the Agreement's concerns, it tracked the very language of Article I of the Agreement.

The Government's argument is thus reduced to an assertion that, irrespective of any of the underlying facts of the case, the failure specifically to incant Article IV of the Agreement on Detainers is an irrevocable waiver of the claim. Yet there is no language in the Act to support such a rule. While a demand for disposition must be made under Article III to invoke its benefits, there is no provision in Article IV or V requiring a motion which specifically denotes the Agreement as an invariable prerequisite to relief. Compare Speedy Trial Act of 1974, 18 U.S.C. §3162(a)(2). Rather, the Agreement commands that in the event it is violated, the court "shall enter an order" dismissing the indictment with prejudice. Article V(c). Congress' failure to include such a provision is persuasive evidence that no such automatic bar was intended. The Government's contention that this failure is insignificant since Congress enacted the Agreement "without any evident awareness that it might apply to the United States as a receiving state" (Pet. Br. at 57 n. 40) is unconvincing, since the materials before Congress

demonstrate that it was fully aware of the federal government's participation in the Agreement as a receiving state. See pp. 12-17, *supra.*[32]

Similarly unpersuasive is the Government's Rule 12 argument. Rule 12, Fed. R. Crim. P., requires assertion before trial of a number of defenses and provides that any not raised will be waived. As the Government concedes, a motion for a speedy trial under a statute such as the Agreement is not included as a claim which must be raised before trial. While Rule 12 also provides that any defense, objection or request capable of determination without trial *may* be raised by motion, there is no waiver specified for failure to make these non-mandatory motions. Furthermore, it is not at all clear that even this section of Rule 12 applies to respondent's claim, since, as Professor Moore has suggested "[m]otions raising defensive matter cognizable under Rule 48(b) (dismissal for lack of speedy trial or for failure to prosecute) would still appear to operate independently of Rule 12." 8 J. Moore, *Moore's Federal Practice,* ¶12.02[1] at 12-13 (1977 Rev.). Accord, *United States v. Cyphers*, 556 F.2d 630, 634 (2d Cir. 1977), *petition for cert. filed sub nom. United States v. Ferro*, Sup. Ct. No. 77-326.

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[32]The decision of the court is also consistent with Article IX of the Agreement which states that it "shall be liberally construed so as to effectuate its purposes." Given the very real prejudice respondent has suffered as a result of the delays, to find a waiver would denigrate the purposes of the Agreement. See *United States v. Cyphers*, 556 F.2d 630, 635 (2d Cir. 1977), *petition for cert. filed sub nom. United States v. Ferro*, Sup. Ct. No. 77-326.

The record in this case, the terms of the Agreement, and the lack of any persuasive authority to the contrary cited by the Government compel affirmance of the decision of the court below.

CONCLUSION

For the above-stated reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 77-52

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD T. FORD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondent in his answering brief essentially adopts the reasoning of the court of appeals, arguing that the Interstate Agreement on Detainers Act on its face makes the United States both a sending and receiving state and that the Act must be applied to transfers of state prisoners by writ of *habeas corpus ad prosequendum* to avoid circumvention of its purposes. For reasons set forth in our opening brief, we believe those arguments to be incorrect. Several subsidiary matters set forth in respondent's brief, however, warrant additional comment.

1. In his brief respondent contends (Br. 13–17) that several provisions in the text (Articles II and VIII)

and enabling statute (Section 4) of the Detainers Act, as well as some items of legislative history, provide firm evidence that Congress meant to bind the federal government as both a sending and receiving state. The United States has already acknowledged (Br. 16–17) that certain provisions of the Interstate Agreement on Detainers Act can be read literally to suggest that it participates in the Agreement as both a sending and receiving state. At the same time, however, we have pointed out that such a literal reading of the statute leads to inconsistencies and untoward results not contemplated by Congress and further that a review of the legislative history of the Act as a whole demonstrates Congress' intent to join the United States only as a sending state. Nothing cited by respondent persuasively undercuts that position.

As we noted in our opening brief (Br. 12, 30 n. 24), the Interstate Agreement on Detainers was enacted by Congress without amendment in 1970 and is virtually identical in its language to the original draft promulgated in 1956 under the auspices of the Council of State Governments. Compare, Council of State Governments, *Suggested State Legislation Program for 1957*, 79–85 (1956), with 18 U.S.C. App., pp. 4475–4478. Indeed, Articles II and VIII and Section 4 of the federal enactment, upon which respondent places special emphasis (Br. 13–14), are nothing more than verbatim versions of Articles II and VIII and Section 3 in the original draft. While the statutory language may suggest that the drafters of the Agreement

contemplated that each member jurisdiction (perhaps even including the United States) would participate fully in a sending and receiving capacity, the language provides little meaningful insight into the independent legislative intent of Congress in enacting the Agreement.

We further note that respondent, despite his insistence on literal construction of the Agreement, also finds it necessary at times to look behind the seemingly plain language of the Agreement to avoid an obviously unintended result. Thus, respondent maintains (Br. 28–29) that the requirement of Article IV (a)—that transfer of the prisoner must be delayed for 30 days to give the governor of the sending state an opportunity to disapprove the request—was meant only to preserve existing rights under extradition statutes, although nothing on the face of the Agreement limits its applicability to interstate rather than state-federal transfers.[1] Thus, respondent appears to recognize, as this Court has done, that a search for actual, not merely apparent, intention is entirely appropriate where, as here, strict adherence to the language of a statute would produce awkward and illogical results.

At other times, respondent appears simply to disregard the literal language of the Act. He offers no

[1] Indeed, in at least one case, a defendant transferred from state custody to federal court pursuant to an *ad prosequendum* writ has claimed that his immediate transfer violated the 30-day delay proviso of Article IV(a). *United States* v. *Frye*, C.A. 8, No. 77-1495, decided December 19, 1977.

explanation of the language in Article IV(c) (the speedy trial provision), which by its terms applies only to proceedings "made possible by this article." As we have noted (Br. 33, 49), it is fanciful to suggest that federal trials of state prisoners, long carried out through use of the *ad prosequendum* writ, were in any sense "made possible" by the Detainers Act in a case where, as here, the traditional writ was employed just as it had been in the past. Thus, even a purely literal reading of the Act, without any regard for its legislative history, cuts against respondent's position.

Turning to the legislative history, respondent seeks (Br. 15–17) to derive congressional intent from a letter to the Chairman of the House Judiciary Committee from Graham W. Watt, Assistant to the Commissioner of the District of Columbia, which was appended to both the House and Senate reports recommending enactment of the Agreement. The letter, which focused primarily on the impact of the Agreement on the District of Columbia, also included the observation that passage of the legislation would "entitle the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party State made available for disposition of such detainer." S. Rep. No. 91-1356, 91st Cong., 2d Sess. 7 (1970); H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 7 (1970). Whatever weight that statement might merit in a letter from a *federal* official, however, the

fact remains that it represents only the view of a local official on an issue with which he was not concerned. Significantly, the view is not supported by the comparable letter from the Deputy Attorney General, which makes no mention of this potential result and contains not the slightest indication that the Agreement was understood to apply to the federal government in a receiving capacity. See S. Rep. No. 91-1356, *supra,* at 5–6; H.R. Rep. No. 91-1018, *supra,* at 5–6. Accordingly, Mr. Watt's letter hardly provides a reliable indicator of congressional understanding on this complex matter.

Moreover, it is significant that the House and Senate Committee Reports, which categorically state that "unless the legislation is made applicable to the District, its prosecuting authorities would not be able to have a prisoner in a party State made available for disposition of local detainers" (S. Rep. No. 91-1356, *supra,* at 4; H.R. Rep. No. 1018, *supra,* at 4), express no comparable concern with respect to the federal government. Similarly, both committee reports focus only upon the history of abuses of detainers filed by states against federal prisoners; they do not acknowledge any similar practice of abuses by the federal government of detainers lodged against state inmates or any problems encountered by federal prosecutors in utilizing the *ad prosequendum* writ to secure the presence of defendants incarcerated in state facilities. In short, there is no evidence whatever that Congress or the Department of Justice, which sponsored the bill, shared Mr. Watt's view that the federal government would participate as a receiving state under the Agreement.

2. To rebut our submission that the federal government has long been able to obtain state prisoners by writ of *habeas corpus ad prosequendum*, respondent relies on *Ponzi* v. *Fessenden*, 258 U.S. 254, for the proposition "that a federal court by issuance of the writ could not compel production of a state prisoner" (Br. 23). The only question presented in *Ponzi*, however, was whether an *ad prosequendum* writ issued by a *state* court was effective against federal custodians, who had agreed to comply with the terms of the writ over the prisoner's objection (258 U.S. at 255–256); the Court was not required to consider, and did not decide, whether a federal writ could be enforced under the Supremacy Clause against state officials who refused to comply voluntarily.[2] Similarly, none of the

[2] As one commentator has noted, "[t]he Court gave no consideration to whether the accusing jurisdiction has a duty to provide a speedy trial or to whether the imprisoning jurisdiction has a duty to surrender a prisoner to a jurisdiction demanding implementation of its speedy trial guarantee." Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U. Cin. L. Rev. 179, 184–185 (1966).

Respondent also cites (Br. 22–26) a handful of scattered cases to support the view that federal authorities before the Agreement did have difficulty obtaining custody of state prisoners for prosecution on federal charges. In addition, respondent quotes one state official (Br. 21) to the effect that federal officials may in some cases have abused the detainer system by filing detainers for the sole purpose of hampering an inmate's prospects for parole. Respondent provides no evidence, however, that these materials were presented to, or reviewed by, Congress during its rather abbreviated consideration of the Act. Moreover, it is highly unlikely that Congress, even if it had been aware of such occasional problems, would have intended to deal with these isolated incidents by such a drastic remedy as imposing on the writ of *habeas corpus ad prosequendum* the substantial restrictions contained in the Agreement.

later cases cited by the respondent (Br. 23–24), suggesting that state compliance with a federal *ad prosequendum* writ is purely a matter of comity, addresses the question whether the Supremacy Clause would obligate a non-cooperating state to comply with a federal writ.[3] See *United States* v. *Mauro*, 544 F. 2d 588, 596, n. 1 (C.A. 2), certiorari granted, No. 76–1596, October 3, 1977 (Mansfield, J., dissenting). As Judge Mansfield has observed (*ibid.*), there is no necessary inconsistency "between these decisions, which recognize the role of comity in securing federal-state cooperation, and a case requiring application of the Supremacy Clause when comity might fail."[4]

Respondent also maintains (Br. 25–26) that, before the federal government joined the Agreement, federal officials were not required to seek custody of a state prisoner in order to give him a speedy trial. In *Nolan* v. *United States*, 163 F. 2d 768 (C.A. 8), certiorari denied, 333 U.S. 846, and *United States* v. *Jackson*,

[3] According to respondent (Br. 22, n. 15), the notion that federal courts were powerless to compel the production of a state prisoner for trial may be traced to *Ex parte Dorr*, 3 How. 103, 105. Although there is dictum in that case to support respondent's view, the holding of the Court was only that the language of Section 14 of the first Judiciary Act did not empower federal courts to issue writs of *habeas corpus ad subjiciendum* to inquire into allegations that a state prisoner was being held under a state statute that violated the United States Constitution. That situation was remedied by subsequent legislation. See *In re Neagle*, 135 U.S. 1; *In re Burrus*, 136 U.S. 586.

[4] One commentator has remarked, in this regard, that "the statutory [federal] writ is the supreme law of the land and the imprisoning state has no choice but to yield the prisoner, anything in its law to the contrary notwithstanding." Schindler, *supra*, 35 U. Cin. L. Rev. at 192.

134 F. Supp. 872 (E.D. Ky.), however, the courts, relying on *United States ex rel. Demarois* v. *Farrell*, 87 F. 2d 957 (C.A. 8), ruled only that a prisoner held in one jurisdiction and accused of a crime by another jurisdiction lacked standing to question the discretionary exercise of jurisdiction over his person by the two sovereigns involved, a principle announced in *Ponzi* and followed in numerous lower court opinions. Moreover, prior to *Barker* v. *Wingo*, 407 U.S. 514, the federal courts had generally held that federal defendants waived their speedy trial rights in the absence of an appropriate demand. Thus, although a federal prosecutor often might await the end of a state defendant's sentence before pressing federal charges, he could be made subject to a different obligation where the defendant demanded a speedy trial, an obligation that he had the power to discharge by seeking a writ of *habeas corpus ad prosequendum*. Contrary to respondent's assertion, that obigation was not inapplicable to state prisoners because they were deemed responsible for their own incarceration in another jurisdiction. Indeed, in *Fouts* v. *United States*, 253 F. 2d 215, 217–218 (C.A. 6), the court of appeals specifically declared that an accused did not forfeit his right to a speedy trial by virtue of his confinement in the penitentiary.[5]

[5] After that case was remanded for determination of a waiver issue, the district court concluded that the defendant had waived his right to a speedy trial. See *United States* v. *Fouts*, 166 F. Supp. 38 (S.D. Ohio), affirmed, 258 F. 2d 402 (C.A. 6), certiorari denied, 358 U.S. 884. See also *Morland* v. *United States*, 193 F. 2d 297 (C.A. 10) (waiver of speedy trial right found where defendant had neglected to demand an earlier trial). Indeed, as examples of the "many instances" in which federal prosecutors would await the completion of a state sentence before securing custody of a state prisoner for trial, respondent cites the two cases (*United States* v. *Fouts*, *supra*, and *Morland* v. *United States*, *supra*) in which the defendants were held to have waived their speedy trial rights, and one case (*United States* v. *Lebosky*, 413 F. 2d 280 (C.A. 3), certiorari denied, 397 U.S. 952) in which the eight month pretrial delay was held not unreasonable. In *Wzesinski* v. *Amos*, 143 F. Supp. 585 (N.D. Ind.), there is no evidence that defendant had made any request to be accorded a speedy trial on the federal charges.

In any event, whatever one may conclude from the various materials cited by respondent in this connection, there is simply no support in the relevant legislative history for respondent's conclusion that Congress itself, in enacting the Agreement, was concerned about the adequacy of existing federal procedures for securing custody over state prisoners and that Congress therefore intended the United States to be both a sending and receiving state.[6] As we discussed in our opening brief (pp. 29–32), the House and Senate Reports do not discuss any supposed need for new procedures to help federal prosecutors secure the presence of state prisoners but focus instead on the opportunity for state prosecutors to obtain federal prisoners. We believe that the Detainers Act should be construed in light of that understanding.

[6] We note that, although the Department of Justice participated in the drafting and evaluation of the Agreement on Detainers, the principal proponent of the Agreement within the Department was the Bureau of Prisons, whose sole concern is the role of the United States as a sending state. See, *e.g.*, Council of State Governments, *Summary of Meeting on the Agreement on Detainers*, Baltimore, Maryland (August 28, 1966).

3. In his brief, respondent also attempts to show (Br. 31–33) that federal participation as a receiving state under the Agreement can readily be harmonized with the subsequent enactment of the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.* This claim does not withstand analysis.

At the outset, we note that respondent does not rebut the materials cited in our brief (Br. 38–41) to show that Congress had no understanding that the Agreement already bound the federal government as a receiving state; rather, he relies only on inferences drawn from commentary to the American Bar Association's *Standards Relating to a Speedy Trial* (Approved Draft 1968). While it is true that the transfer provisions of the Speedy Trial Act (18 U.S.C. (Supp. V) 3161(j)) were adopted from the ABA's Standard 3.1, that fact alone does not mean that the intentions of the drafters of the ABA standards were coextensive with the intent of Congress in enacting the statute, and respondent provides no proof that Congress relied on the commentary in passing the Act. Moreover, even if the intentions of those drafters be thought pertinent, there is no evidence that they viewed the procedures outlined in the Interstate Agreement on Detainers as the exclusive means for implementing the Standards' general guidelines (see *Standards Relating to a Speedy Trial, supra,* at 2–3, 33–35, 36, 38) or considered adoption of the Agreement to be a prerequisite to implementation of the standards. At most, the materials cited by respondent suggest that the

drafters regarded the procedures in the Agreement as illustrative, a view that in no way conflicts with Congress' apparent belief that the Agreement did not apply to the federal government as a receiving state.

We have also pointed out (Br. 38–39) that certain provisions of the Agreement, particularly the 30-day delay required by Article IV(a) of the Agreement, would frustrate the primary purpose of the Speedy Trial Act to assure the speediest practicable trial. While respondent suggests that Article IV(a) does not mean what it says (see p. 3 *supra*) and further that such inconsistencies are a reasonable consequence of the different purposes of the two statutes (Br. 33–34), the more plausible explanation (and the one most consistent with the legislative history of the Speedy Trial Act) is that Congress simply did not believe the Agreement applied to the federal government as a receiving state. Though not conclusive, that later belief of Congress is surely relevant in determining whether the Agreement was intended to accomplish a significant reordering of the method by which federal prosecutors had previously obtained state prisoners for trial.

4. Turning to the waiver issue (see Gov't Br. 53–59), respondent contends (Br. 42–45) that the timely assertion of his constitutional right to a speedy trial and the invocation of local speedy trial rules should be allowed to excuse his conceded failure to raise before the district court a specific claim of non-compliance with the speedy trial provisions of the Interstate Agreement on Detainers. Indeed, respondent stresses as support for his argument the fact that his

general speedy trial objections were made before any court had held the federal government bound by the Agreement when it secured the presence of a state prisoner pursuant to an *ad prosequendum* writ. We take a different view.

The facts of this case demonstrate quite effectively why speedy trial claims on other grounds do not serve to raise the issue under the Agreement. After examin-
why speedy trial claims on other grounds do not serve
ing the relevant circumstances, the court of appeals concluded (Pet. App. 22a–24a) that all adjournments prior to February 18, 1975, had been properly granted by the district court and that respondent's claim depended entirely on delays occurring after that date. Had respondent incorporated his claim under the Agreement in his initial motion to dismiss, dated November 4, 1974, the government and the trial court, having been put on adequate notice, might well have been able to assure that respondent's trial commenced within the period required by Article IV(c). At the very least, respondent (who had the assistance of competent counsel) had an obligation to claim this statutory benefit before conclusion of the proceedings in the district court and transmission of the case to the court of appeals.[7]

[7] In *United States* v. *Scallion*, 548 F. 2d 1168 (C.A. 5), petition for a writ of certiorari pending, No. 76–6559, the Fifth Circuit held, in considering a claim under the Agreement that it also rejected on other grounds, that the defendant had waived any violation of the speedy trial provision of Article IV(c) by failing to raise the issue in a timely fashion (*id.* at 1174), even though the defendant had moved prior to trial—as did respondent here—to dismiss the indictment on constitutional speedy trial grounds.

We also note that, if a failure to raise claims under the Agreement were not treated as a waiver, some defendants might be encouraged to withhold those claims for tactical reasons. For example, the Second Circuit has held that, as dismissals under Article IV (c) apply only to the offenses actually charged, reindictment on related but separate charges is permissible. *United States* v. *Cumberbatch*, 563 F.2d 49 (C.A. 2), petition for a writ of certiorari pending, No. 77–5590. In such cases, as the Court has indicated in discussing the waiver provisions of Rule 12 of the Federal Rules of Criminal Procedure,

> there would be little incentive to [raise the issue before trial] * * * when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

Davis v. *United States*, 411 U.S. 233, 241. See also *Wainwright* v. *Sykes*, No. 75–1578, decided June 23, 1977, slip op. 17. A defendant with a colorable claim under the Agreement, especially a defendant like respondent who has demonstrated no significant prejudice as a result of the delay, thus might elect to assert only a portion of his speedy trial claim while postponing others to minimize the likelihood of reindictment on related charges.

Finally, we believe that respondent mistakenly relies (Br. 44) on *United States* v. *Cyphers*, 556 F. 2d 630 (C.A. 2), petition for a writ of certiorari pending, *sub nom. United States* v. *Ferro*, No. 77–326, as authority for the proposition that Rule 12 of the Federal Rules of Criminal Procedure does not bar the untimely assertion of a speedy trial claim under Article IV(c) of the Agreement. See also *United States* v. *Eaddy*, 563 F. 2d 252 (C.A. 6). While we believe that *Cyphers* and *Eaddy* are incorrectly decided, we also note that neither defendant was aware at the time of trial that a detainer had been filed against him. *United States* v. *Cyphers*, *supra*, 556 F. 2d at 635; *United States* v. *Eaddy*, *supra*, 563 F. 2d at 255. Thus, those cases arguably fall into that category of cases where the defendant was not aware of the necessary facts to assert a timely claim. See, *e.g.*, *Askins* v. *United States*, 251 F. 2d 909 (C.A. D.C.). Here, by contrast, respondent has never suggested that he was unaware of the detainer's existence during the pretrial period in which he claims his rights under the Agreement were violated.

CONCLUSION

For the reasons stated herein and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General.

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